No. 75-1678

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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FEDERAL POWER COMMISSION, PETITIONER

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-13a) is reported at 522 F.2d 1345. The initial order of the Federal Power Commission (App. D, *infra*, pp. 20a-24a), and its order denying rehearing (App. F, *infra*, pp. 27a-36a), are not yet reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 14a-17a) were entered on November 14, 1975. The Commission's timely petition for rehearing was denied on January 20, 1976 (App. C, *infra*, pp. 18a-19a). On April 12, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including May 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Federal Power Commission is required under the Natural Gas Act to impose, in certain circumstances, proposed compensation schemes whereby high-priority pipeline customers would make payments to low-priority customers in full or partial compensation for the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries.

STATUTES INVOLVED

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 1(b), 15 U.S.C. 717(b):

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 4(a) and (b), 15 U.S.C. 717c(a) and (b):

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of

any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

STATEMENT

1. On August 5, 1974, respondent Mississippi Public Service Commission filed on behalf of certain electric utilities in Mississippi [1] a petition for extraordinary relief from the natural gas curtailment plan of United Gas Pipe Line Company. The petition requested the Commission to "initiate a proceeding to establish a method by which the electric utilities are [financially] compensated for the additional costs of replacement fuel they are required to use as a result of having been placed in the lowest priority of curtailment" (C.A. App. 3).[2]

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[1] The electric utilities are Mississippi Power Company, respondent Mississippi Power and Light Company, and South Mississippi Electric Power Association.

[2] "C.A. App." refers to the joint appendix in the court of appeals.

Under United's curtailment plan, the electric utilities were assigned the lowest priority in recognition of the inferior use of natural gas as boiler fuel in the generation of electricity. As the court of appeals observed, the use of natural gas as boiler fuel is deemed inferior because it is the least efficient

The Commission, concluding that it "lack[ed] * * * jurisdiction to grant the requested relief" (App. D, *infra*, p. 22a), denied the petition (*id.* at 20a-24a). It reasoned that "requir[ing] certain high priority jurisdictional customers [of a pipeline] to pay rates which included an increment to compensate other customers for their costs of alternate fuel" would necessarily result in the payment of rates and charges that are not "based upon the pipeline's cost of service plus a reasonable rate of return" and therefore not "just and reasonable" under Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a) (App. D, *infra*, p. 22a).

Moreover, because the Commission's rate jurisdiction is limited to sales of gas in interstate commerce *for resale*, it would have "no jurisdiction whatsoever over the rates which are charged by pipelines for their sales of gas to direct industrial customers" who, like the Mississippi electric utilities, do not buy it for resale (*id.* at 23a). Consequently, there would be "no means whereby [the Commission] could insure that low priority direct industrial customers * * * would be 'compensated' for their costs of alternate fuel" (*ibid.*).

Finally, the Commission viewed the Public Service Commission's petition, at bottom, as "nothing more than an attempt to obtain damages because of

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use of such fuel and because customers using gas for this purpose are better able to convert to alternate fuels (App. A, *infra*, p. 5a, n. 7).

United's inability to deliver its full contractual commitment" (*ibid.*). But "a pipeline's damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court" (*ibid.*).

2. The Commission thereafter denied applications for rehearing (App. F, *infra*, pp. 27a-36a). In its order denying rehearing, the Commission incorporated the analysis contained in two orders previously entered in a similar but unrelated case, in which the Commission had explained why "such compensation schemes are unacceptable as a matter of law and policy" (*id.* at 29a).[3] The Commission summarized its reasoning in those orders as follows (*ibid.*):

> [A] compensation scheme would allow higher rates unrelated to the pipelines' cost of service plus a reasonable rate of return; foster discriminatory rates among groups of consumers contrary to Section 4 of the Natural Gas Act; and

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[3] The two orders were issued in *Transcontinental Gas Pipe Line Corp.*, Docket No. RP 72-99, and are reproduced as Apps. G and H, *infra*, pp. 37a-72a and 73a-102a, respectively. On petitions for review in the *Transcontinental* case, the United States Court of Appeals for the District of Columbia Circuit entered an order directing the Commission to investigate the pipeline's supply situation and to report to the court within 30 days. On January 19, 1976, this Court vacated that order and remanded the case to the court of appeals for further proceedings. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584. The court of appeals thereafter remanded the case to the Federal Power Commission for the development of a record on the pipeline's supply situation (App. I, *infra*, pp. 103a-119a). See pp. 14 and 16, *infra*.

cause overall results which are inconsistent with equity and the public interest. * * *

3. The court of appeals set aside the Commission's orders and remanded for further proceedings (App. A, *infra*, pp. 1a-13a). The court recognized that, because of the statutory limitations on the Commission's rate jurisdiction and the standards governing its review of natural gas rates, compensation schemes would be unlawful and beyond the Commission's authority to approve if the payments were properly characterized as rates or rate changes (*id.* at 10a). The court had a single answer: "compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans" (*ibid.*). "[T]he basis for the imposition of such charges," the court held, "is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission" (*ibid.*).

It followed from the court's analysis that the Commission could impose these "surcharges" as a "condition for the receipt of higher priority gas" (*id.* at 12a), without applying the statutory "just and reasonable" rate standard and without concern for whether the payments would constitute "discriminatory rates" (*id.* at 10a). Similarly, since only the Commission's *rate* jurisdiction is limited to sales for resale, the court concluded that its characterization of the compensation payments as "surcharges" an-

swered the Commission's argument that "a system of compensation would require it to exercise rate-making authority over direct sale customers" (*id.* at 11a).

Finally, the court rejected the contention that payments made by one customer to compensate another for the receipt of gas would amount to "sales for resale requiring certification and tariff filing" under Sections 4 and 7 of the Act (*id.* at 11a). "[W]e do not find such payments to be sales in any realistic sense of the word" (*ibid.*).

The court, "intimat[ing] no view one way or the other as to whether compensation should be included," remanded the matter to the Commission to "make findings supported by an adequate record, relating to the inclusion or failure to include compensation as a part of a curtailment plan" (*id.* at 12a).

REASONS FOR GRANTING THE WRIT

1. The compensation issue presented by this case is of substantial importance in the administration of the Natural Gas Act. The Federal Power Commission interprets the statute to foreclose the imposition of any scheme whereby high-priority customers under a pipeline's curtailment plan are required, as a condition of receiving natural gas deliveries, to make additional payments for the benefit of low-priority customers whose deliveries are curtailed. The court of appeals has held, by contrast, that the Act does not preclude the imposition of such a compensation scheme and indeed requires the Commission to impose such a scheme if necessary "to insure that the

burdens of curtailment are spread evenly and equitably among those affected by such plans" (App. A, *infra*, p. 10a).

The effect of the court of appeals' decision, as we understand it, would be to require a general restructuring of pipeline rates for sales of natural gas on the basis of factors other than those that have long governed the Commission's determination of justness and reasonableness. If, as we believe, the court of appeals' interpretation of the statute is in error, prompt correction of that error will avert a spate of unnecessary administrative and judicial litigation over the merits of particular compensation schemes proposed in connection with each pipeline's curtailment plan.[4]

[4] Compensation schemes have been sought in the following administrative proceedings before the Federal Power Commission: *Panhandle Eastern Pipeline Company*, Docket No. RP71-119; *Texas Gas Transmission Corporation*, Docket No. RP72-64; *Columbia Gas Transmission Corporation*, Docket No. RP72-89; *Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99; *Mississippi River Transmission Corporation*, Docket No. RP73-6; *Consolidated Gas Supply Corporation*, Docket No. RP73-115; *Southern Natural Gas Company*, Docket No. RP74-6; *Northwest Pipeline Corporation*, Docket Nos. RP74-49 and RP76-34.

The Commission's rejection of compensation schemes has been challenged in the following court cases: *Cascade Natural Gas Corporation* v. *Federal Power Commission*, C.A. D.C., No. 75-1455; *Consolidated Gas Supply Corporation* v. *Federal Power Commission*, C.A.D.C., No. 75-1324; *Elizabethtown Gas Company* v. *Federal Power Commission*, C.A. D.C., No. 75-1767; *Transcontinental Gas Pipe Line Corporation, et al.* v. *Federal Power Commission*, C.A.D.C., Nos. 74-2036, *et al.*

In its recent opinion in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584, decided January 19, 1976—another case in which the Commission rejected as unlawful a proposed curtailment compensation scheme—this Court, while not reaching the merits of the Commission's action, noted "the potential importance of a resolution on the merits of the compensation issues presented in the instant case" (slip op. 5).[5] Those issues are squarely presented by this petition, and their importance is now concrete.

2. The court of appeals decided the compensation issue incorrectly. The court recognized, as the Commission had, that "characterizing the compensation payment as either a rate in itself or a change in the rates of the natural gas company * * * necessarily sets up a jurisdictional barrier to compensation" (App. A, *infra*, p. 10a). In an effort to breach that barrier, the court held that "compensation payments are not 'rates' but in the nature of surcharges" (*ibid.*). The court's substitute label, however, does not change the character and effect of compensation payments.

The payment of compensation by a high-priority user for the benefit of a low-priority user necessarily establishes the rate that the high-priority user must pay in order to receive the volumes of natural gas to

[5] The Court referred in an accompanying footnote to the court of appeals' decision in the present case, which was then pending on the Commission's petition for rehearing. Rehearing was denied by the court of appeals on January 20, 1976 (App. C, *infra*, pp. 18a-19a).

which he is entitled under the pipeline's curtailment plan. The court of appeals apparently recognized as much, describing the payment of compensation as "a condition for the receipt of higher priority gas" (*id.* at 12a). In operation, a compensation scheme would require the pipeline to increase the rates to its higher priority customers and to pass those increases on to the lower priority customers through decreased rates to them. That would unavoidably entail a fundamental restructuring of the pipeline's rates, and the Commission would be required to examine those rates to ensure that they are just and reasonable and not unduly discriminatory under Sections 4(a) and (b) of the Act.

Moreover, even if compensation payments could properly be viewed, not as "rates," but as "surcharges" imposed in a curtailment plan "to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans" (App. A, *infra*, p. 10a), that characterization would not raze the jurisdictional barriers perceived by the Commission. Section 4(a) of the Act provides that "[a]ll rates *and charges* made, demanded, or received by a natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable" (emphasis added). Thus, "surcharges" as well as "rates" must be just and reasonable under Section 4.[6]

[6] The Commission has historically required charges for jurisdictional transactions to be just and reasonable whether they are called "rates" or "surcharges." Cf. *Mississippi Power Co.*, 45 F.P.C. 269. An example of a surcharge is a purchased gas adjustment (PGA) clause. Under Section 154.38 of the Commission's regulations, a natural gas company may submit a purchased gas cost adjustment provision in its tariff to flow through changes in its cost of purchased gas. 18 C.F.R. 154.38(d)(4). Since a PGA charge changes the rate, it must be tested under the just and reasonable standard of Section 4 even though it may be characterized as a surcharge. Similarly, the Commission may sanction a gas company's demand charge credits, which effect a reimbursement to customers in a particular rate zone who have been curtailed more than the average in that zone. These credits, however, must be based on cost of service and are reviewed under Section 4 for their justness and reasonableness. Finally, while most curtailment plans contain a provision for penalty payments for unauthorized overtakes, the penalty provision must be filed as part of the curtailment tariff and is evaluated under the just and reasonable standard of Section 4. Thus, the court of appeals' reliance upon an analogy between compensation payments and overtake penalty payments (App. A, *infra*, pp. 10a-11a) actually supports rather than undercuts the Commission's position with respect to compensation payments.

Any compensation scheme, however, would necessarily result in rates that are "not just and reasonable" and therefore are "unlawful" under Section 4(a) of the Act. As the Commission said (App. D, *infra*, p. 22a):

> [I]t is elementary that a pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return. [Citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591.] If we required certain high priority jurisdictional customers to pay rates which included an increment to compen-

sate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

Similarly, rates resulting from compensation schemes would necessarily be unduly discriminatory, contrary to Section 4(b) of the Act. The point was made tellingly by Judge MacKinnon in his opinion dissenting from the District of Columbia Circuit's recent remand to the Commission in the *Transcontinental* case (see note 3, *supra*).[7] Under a compensation scheme, as Judge MacKinnon stated, the pipeline "would charge different rates to similarly situated customers which rates were not the result of differences in [the pipeline's] cost of serving these customers" (App. I, *infra*, p. 116a). Rather, the "different rates would result from the varying degree to which each customer is curtailed and the degree of curtailment would be determined in part by the character of the use of the gas by the customer" (*ibid.*). Judge MacKinnon correctly concluded that the resulting rate discrimination would be unreasonable because it "would penalize high priority users for the benefit of low priority users" (*id.* at 117a).

Moreover, under a curtailment plan with a compensation feature, those customers of a pipeline who forego volumes of gas to which they are contractually

[7] The majority of the court of appeals panel in *Transcontinental* did not reach the merits of the compensation scheme, believing that a remand for the development of a record on the pipeline's supply situation was a necessary precondition to a decision on the merits (see App. I, *infra*, pp. 114a-115a).

entitled and, in consideration therefor, receive compensation payments from customers who do receive gas, would be engaging in sales for resale of natural gas in interstate commerce without first obtaining requisite certificates of public convenience and necessity under Section 7(c) of the Act and without making the tariff filings required by Section 4(a) and (d). Although the court of appeals did not consider these transactions to be "sales in any realistic sense of the word" (App. A, *infra*, p. 11a), the Commission correctly determined that "[t]he elements of a sale are present" (App. H, *infra*, p. 85a) in the kind of "interstate brokering of contractual entitlements" (App. G, *infra*, p. 53a) that would take place under a compensation scheme.

Finally, even if the Commission could approve a compensation scheme as part of a pipeline curtailment plan, it would have no jurisdiction over the pipeline's rates or charges with respect to sales to direct industrial customers, such as the electric utilities involved in the present case. The Commission would therefore be powerless to ensure that the pipeline's charges to those customers reflected a reduction equivalent to the compensation payments made by higher priority customers.

3. A compensation scheme of the sort envisioned by the court of appeals would tend to defeat the objectives of end-use curtailment. The Commission has determined that the allocation of available natural gas supplies in times of shortage should be based on the use to which the gas will ultimately be put, so that,

when the demands of all customers cannot be met, those who would put the gas to inferior use would have their deliveries curtailed first. The Commission's statutory authority to follow an approach that focuses on end-use rather than contractual entitlements was upheld by this Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642-647. See also *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F.2d 925, 935-936 (C.A.D.C.), certiorari denied *sub nom. Southern California Gas Co.* v. *Federal Power Commission*, 419 U.S. 882; *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (C.A. 5).

By financially penalizing high-priority end-use customers for the benefit of low-priority users, a compensation scheme would, as Judge MacKinnon stated in his dissenting opinion in *Transcontinental*, "operate inconsistent with the approved objective of the Commission to base curtailment on end-use" (App. I, *infra*, p. 117a). Judge MacKinnon correctly identified the reasons for that inconsistency (*ibid.*; emphasis in original):

> [T]he higher price required to be paid by high priority users would deter such priority customers from fully satisfying their needs and would thereby make the unused portion of their full entitlements to gas available for low priority users which in many instances is the more inefficient use. In any event it has been determined to be the lower *priority* use and favoring such low priority use, to the extent that the compensation scheme does, would frustrate and interfere with the operational scheme of the curtailment plan by interjecting factors that work against the principles upon which the plan is based.

Under the court of appeals' decision in the present case, the Commission would nevertheless be required to impose such a scheme if necessary "to insure that the burdens of curtailment are spread evenly and equitably" (App. A, *infra*, p. 10a). Spreading the "burdens," however, means incorporating a financial disincentive for high-priority natural gas consumption, a disincentive that would undercut the end-use priority structure of the curtailment plan itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1635, 75-1712

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nov. 14, 1975

Petition for Review of an Order of the Federal Power Commission.

Before BELL, CLARK and RONEY, Circuit Judges.

BELL, Circuit Judge:

Mississippi Public Service Commission (MPSC) and Mississippi Power and Light (MP & L) seek review of an order of the Federal Power Commission denying MPSC's petition for extraordinary relief from a curtailment plan approved by the Commission for United Gas Pipeline Co. (United).[1] The

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[1] The currently effective curtailment plan for United was originally filed by United in 1971 and subsequently accepted, as modified, by the Commission in Opinion No. 606, 46 F.P.C. 786 (1971). The Commission subsequently rejected the cur-

extraordinary relief was to be in the form of payments from higher to lower priority customers of United to compensate the latter for the greater costs of alternative fuels they were forced to use as a consequence of curtailment. The Commission denied relief on the ground that it lacked jurisdiction to order or approve any plan of compensation. We disagree and therefore set aside the order and remand the case to the Commission for further proceedings.

I

This case arises from the interaction of the increasing shortage of natural gas with the inflationary effects of the general energy crisis. Natural gas, traditionally a cheap, clean and efficient energy source, has become even more attractive as a fuel bargain in the context of today's soaring energy costs. The regulated price of natural gas in the interstate market has become disproportionately low relative to

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tailment plan of Opinion No. 606 with its Opinion No. 647, 49 F.P.C. (1973) and Opinion No. 647-A, 49 F.P.C. 1211 (1973) which were reviewed by this court in *Louisiana* v. *FPC*, 5 Cir., 1974, 503 F.2d 844. This court found that the Commission had failed to comply with Section 5 of the Natural Gas Act in not finding the currently effective curtailment plan to be unjust and unreasonable and remanded the case to the Commission for further findings in that regard. The Commission's order on remand from this court, entered on September 6, 1974, is now pending before another panel of this court. *Louisiana Power & Light Co., et al.* v. *FPC*, Nos. 75-2183, 75-2339, 75-2347, 75-3057 (argued October 17, 1975).

the per energy-unit costs of alternative fuels. One consequence of the increasing inability of natural gas producers to meet the demands of their customers has been the need to curtail deliveries to those customers on the basis of some equitable plan, as approved by the Federal Power Commission. Where deliveries have been curtailed, natural gas users have been forced to use alternative, more expensive fuels.

The Supreme Court has held [2] that the Commission has the authority to approve curtailment plans of natural gas producers on the basis of the Commission's jurisdiction, under Section 1(b) of the Natural Gas Act, over the transportation of natural gas in interstate commerce.[3] The authority is subject to the statutory standard of Section 4(b) of the Act.[4]

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[2] *FPC* v. *Louisiana Power & Light Co.*, 1972, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369.

[3] Section 1(b), Natural Gas Act, 15 U.S.C.A. § 717(b) provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged, in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[4] Section 4(b), Natural Gas Act, 15 U.S.C.A. § 717c(b) provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the juris-

Numerous cases have arisen in the courts challenging various aspects of those plans, which allocate available natural gas on the basis of priorities determined primarily by the end use that particular customers make of the natural gas.[5] Under the usual plan, provision is made for seeking extraordinary relief where justified by exigent circumstances. The order here under review concerns such a petition.

II

MPSC filed its petition for extraordinary relief on August 5, 1974, on behalf of the consumers served by three Mississippi electrical utilities subject to its regulation, MP & L, Mississippi Power Company (MPC), and South Mississippi Electric Power Association (SMEPA).[6] These utilities, by virtue of their

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diction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[5] *See e.g., Consolidated Edison Co. of New York Inc.* v. *FPC,* D.C.Cir., 1975, 512 F.2d 1332; *Lousiana Power & Light* v. *FPC, supra; Atlanta Gas Light Co.* v. *FPC,* 5 Cir., 1973, 476 F.2d 142.

[6] Aside from the request for institution of a compensation plan, MPSC also requested that the electric utilities under its regulation be exempted from the curtailment of gas deliveries under the interim plan. The Commission denied this request also, but no party has chosen to appeal that denial. We therefore do not consider the issue.

"inferior" use of natural gas for boiler fuel,[7] had been given the lowest priority in United's curtailment plan, and had therefore been forced to use alternate fuels at four and five times the price of natural gas. The cost of these alternate fuels had been passed directly to their customers by the use of fuel adjustment clauses authorized by MPSC. All three utilities had firm contracts with United to supply varying amounts of natural gas, but the effect of the curtailment plan was to deny them their contractual entitlements in varying degrees.

The rationale of the relief sought by MPSC for the utilities was that the practical and economic burdens of curtailment should not fall solely on these lower priority users, but that, in order for the curtailment plan to be just, reasonable and equitable, the higher priority users should also bear some of the economic burden of curtailment. A number of parties intervened in the petition for relief, including the three Mississippi electric public utilities, Mississippi River Transmission Company (MRT) (a distributor of natural gas), and United, as the pipeline affected by any proposed plan of compensation. There were various other intervenors who are not now before the court. On October 17, 1974, the Commission granted the several interventions, but denied the relief requested by MPSC, stating:

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[7] The use of natural gas for boiler fuel is deemed "inferior" because it is the least efficient use of such fuel and because customers who make such use of natural gas can presumably convert to alternative fuels.

> Assuming MPSC's allegations of fact to be correct, we conclude that the petition should be summarily dismissed for lack of jurisdiction to grant the requested relief.

The Commission supported its decision by stating that a system of compensation payments would have several unlawful effects: first, jurisdictional resale rates under such a system, i.e., by United, would not be related to the pipeline's cost of service plus a reasonable rate of return, and would therefore be in violation of the statutory standard of just and reasonable. Second, the Commission has no jurisdiction over the rates of direct sale customers, who in most instances would give or receive such compensation payments. Finally, the Commission construed the petition as being "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment," a matter to be resolved only by an appropriate court.

MPSC, MP & L and MPC petitioned for rehearing, arguing that the Commission had misconstrued the request for relief. On December 4, 1974, the Commission granted the petition for purposes of further consideration, but finally denied the petition for rehearing and terminated the proceeding on February 13, 1975. The Commission noted that it had taken similar action in another but unrelated proceeding, and incorporated the reasoning in the orders in the other proceeding by reference.[8]

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[8] *Transcontinental Gas Pipe Line Co.*, FPC Docket No. RP72-99, Order Finding An Emergency On Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement, January 10, 1975, *pending review sub nom. Transcontinental Gas Pipe Line Corp., et al.* v. *F.P.C.*, D.C. Cir., Nos. 74-2036, et al. (argued May 21, 1974).

Although eschewing jurisdiction, the Commission goes further in that proceeding and seems to decide the petition for relief on the merits. We do not reach the merits, preferring to allow the Commission to reconsider the matter in light of our holding that jurisdiction exists. Moreover, any consideration on the merits in this court must be on the basis of findings made by the Commission on an adequate record.

III

MPSC and MP & L seek review of that final order in two appeals, No. 75-1635 and No. 75-1712, which are consolidated for review by this court. There are three intervenors: MPC sides with MPSC and MP & L in arguing that the Commission erred in finding no jurisdiction. MRT, as a high priority user who might have to make compensation payments, supports the Commission and asserts that, in effect, the lower priority customers are asking MRT to pay damages based on United's breach of contract. Finally, United supports jurisdiction in the Commission and the concept of compensation if submitted in and considered as a part of the present remanded curtailment proceeding or as a part of an industry-wide rule making proceeding.

MPSC and those who favor compensation argue that the Commission has jurisdiction, and the power under its jurisdiction to approve equitable curtailment plans, to impose a system of compensation pay-

ments to make such plans equitable as "pragmatic adjustments . . . called for by [the] particular circumstances." *FPC* v. *Louisiana Power & Light Co.*, 1972, 406 U.S. 621, 642, 92 S.Ct. 1827, 1839, 32 L.Ed.2d 369, 386, *quoting FPC* v. *Natural Gas Pipeline*, 1942, 315 U.S. 575, 586, 62 S.Ct. 736, 86 L.Ed. 1037, 1050. The Commission, on the other hand, asserts that it has no jurisdiction to order compensation payments and moreover, if it did, such payments would be either impractical or not in the public interest.

The question presented is one of law: Did the Commission have jurisdiction to effectuate relief of the type sought in the petition for extraordinary relief. *See Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, for a similar review of a denial of jurisdiction by the Commission. Our review of the Commission's decision is guided by the principle that, while we may not order the Commission to exercise its discretion in a particular way, we may order the Commission to consider a matter that is within the jurisdiction if such be the case. *Cf. Addison* v. *Holly Hill Fruit Products*, 1944, 322 U.S. 607, 622, 64 S.Ct. 1215, 88 L.Ed. 1488, 1499.

We consider whether the Commission was correct in light of the language of the Supreme Court in *FPC* v. *Louisiana Power & Light*, *supra;*

> Since curtailment programs fall within the FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective

means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, L.Ed. 1037, 1050 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ." 15 U.S.C. § 717*o*.

In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." (citations omitted)

406 U.S. at 642, 92 S.Ct. at 1839, 32 L.Ed.2d at 386.

It seems plain from this that the Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment.

The Commission argues to this court that it does not have the jurisdiction to order compensation, but approaches this position in reverse. The asserted lack of jurisdiction is not because there is no statutory basis for compensation, but rather because there are effects of compensation as well as provisos within the

Natural Gas Act that cumulatively preclude the implementation of compensation.

In its brief here, the Commission poses three ostensible barriers to compensation payments. They are somewhat like the reasoning given in its order denying relief. First, it asserts that compensation payments would result in discriminatory rates in violation of the stautory standard of Section 4(b) of the Natural Gas Act. 15 U.S.C.A. § 717c(b). Second, it asserts that compensation payments would in effect be sales for resale of gas in interstate commerce requiring both certification and filing of tariff schedules. Finally, the Commission urges that the Natural Gas Act specifically excepts from the Commission's jurisdiction ratemaking authority over direct sales of gas. 15 U.S.C.A. § 717(b).

The essential problem is that the Commission defines "rates" too broadly. By characterizing the compensation payment as either a rate in itself or a change in the rates of the natural gas company, the Commission necessarily sets up a jurisdictional barrier to compensation. It seems to us, however, that compensation payments are not "rates" but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission. Moreover, compensation payments are more analogous to the pen-

alty payments included by the Commission in various curtailment plans to deal with the problem of overtakes.[9]

The contention that compensation payments are sales for resale requiring certification and tariff filings is also without substance. Because we do not view compensation payments as rates but rather as being in the nature of surcharges or penalties, we do not find such payments to be sales in any realistic sense of the word.

Our characterization of compensation payments also answers the argument of the FPC that a system of compensation would require it to exercise ratemaking authority over direct sale customers. In addition, contrary to the Commission's view, the provision of the Act, Section 1(b), which denies the Commission jurisdiction over direct sales is not a limitation on the transportation jurisdiction of the Commission but rather should be seen in the context of the original regulatory scheme envisioned by Congress of complementary federal and state regulation. See e.g., *FPC* v. *Transatlantic Gas Pipe Line Corp.*, 1961, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742. The purpose of the proviso regarding direct sales was to

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[9] *See e.g.*, Panhandle Eastern Pipeline Company Tariff Schedules § 16.5, approved in 46 F.P.C. 1142, 1145 (1971); 47 F.P.C. 1567, 1569 (1972).

allocate the regulatory powers of the Commission and the various state agencies concerned with regulating the sale of natural gas within each state. The proviso does not preclude jurisdiction over the question of compensation as here presented.

In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.

Having considered the breadth of the Commission's jurisdiction, the question remains what action by this court is proper. In essence, what the Commission has done is to fail to exercise its jurisdiction by refusing to consider, with an appropriate record, a proposed remedy for an asserted wrong. *Cf. NLRB* v. *Food Store Employees*, 1974, 417 U.S. 1, 9-10, 94 S.Ct. 2074, 40 L.Ed.2d 612, 618. We, of course, intimate no view one way or the other as to whether compensation should be included. This court can, however, compel the Commission to exercise its jurisdiction by considering whether compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan. *Cf. Addison* v. *Holly Hill Fruit Products, supra.* Whatever the result on remand, the Commission should make findings supported by an adequate record, relating to the inclusion or the failure to include compensation as a part of a curtailment plan. *Cf. Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

The relief sought by petitioners would require a modification of the curtailment plan now filed with the Commission. Our decision is without prejudice to the Commission considering their petitions and related pleadings, whether by way of consolidation, intervention or otherwise, as a part of the proceedings on the curtailment plan.

Set aside and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 75-1635

Your No. FPC RP-74-37-12

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Power Commission (MISSISSIPPI CASE)

Before BELL, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Mississippi Public Service Commission for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this cause be, and the same is hereby, set aside; and that this cause be, and the same is hereby remanded to the Federal Power Commission for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs are to be taxed against any intervenors in support of the order of the Federal Power Commission.

November 14, 1975

Issued as Mandate: Jan. 28, 1976

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1975

No. 75-1712

Your No. FPC RP-74-37-12

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Power Commission (MISSISSIPPI CASE)

Before BELL, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Mississippi Power & Light Company for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this cause be, and the same is hereby, set aside; and that this cause be, and the same is hereby remanded to the Federal Power Commission for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs are to be taxed against any intervenors in support of the order of the Federal Power Commission.

November 14, 1975

Issued as Mandate: Jan. 28, 1976

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 75-1635 & 75-1712

[Filed U.S. Court of Appeals, Jan. 20, 1976,
Edward W. Wadsworth, Clerk]

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

(Opinion November 14, 1975, 5 Cir., 1975,
—— F.2d ——).

(JANUARY 20, 1976)

Before BELL, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.*

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* Chief Judge Brown, Judges Wisdom, Goldberg, Ainsworth, Godbold, Dyer and Gee, not participating.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

Docket No. RP74-37-12

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER DENYING PETITION FOR EXTRAORDINARY RELIEF, GRANTING INTERVENTIONS, AND TERMINATING PROCEEDINGS

(Issued October 18, 1974)

On August 5, 1974, the Mississippi Public Service Commission (MPSC) filed in the above referenced docket a petition for extraordinary relief from United Gas Pipe Line Company's (United) curtailment plan. Specifically, MPSC requests that the Commission immediately initiate a proceeding to establish a means by which certain electric utilities operating in the State of Mississippi [1] are compensated for the costs of replacement fuel they are required

[1] These electric utilities are Mississippi Power Company, Mississippi Power and Light Company, and South Mississippi Electric Power Association.

to use as a result of the curtailment of natural gas deliveries by United below their contractual entitlements. MPSC further requests that this Commission immediately issue an order permitting such electric utilities to receive their contract entitlements of natural gas from United until such time as a method of compensation is established in the proceeding requested, or until the price of oil approximates that of natural gas.

In support of its request, MPSC alleges that because of severe curtailment by United, the three electric utilities have been forced to use increasingly greater quantities of fuel oil to replace the natural gas they would otherwise be entitled to under their contracts. MPSC further alleges that it has permitted these electric utilities, subject to its jurisdiction, to include fuel cost adjustment clauses in their retail rate schedules and that, therefore, the cost of providing electric service in Mississippi has substantially increased to the ultimate detriment of electric consumers in that state since oil is more expensive than natural gas. In MPSC's view a portion of this increased financial burden, now being borne by those electric utilities and their customers, should be shifted to customers of United who have been accorded a higher priority for purposes of curtailment.

On August 16, 1974, we issued a notice of MPSC's petition, whereupon timely petitions or notices to intervene were filed by the following parties: Mississippi Power Company, Mississippi Power and Light Company, Attorney General of the State of Missis-

sippi, United Gas Pipe Line Company, Mississippi River Transmission Corporation, Laclede Gas Company, Texas Eastern Transmission Corporation, General Motors Corporation, Air Products, *et al.*, Mobile Gas Service Corporation, Shell Oil Company, Mississippi Valley Gas Company, New Orleans Public Service, Inc., and Entex, Inc. Untimely petitions were filed by Willmont Gas and Oil Company, City of Cleveland, Mississippi, and Gulf States Utilities Company.

Assuming MPSC's allegations of fact to be correct, we conclude that the petition should be summarily dismissed for lack of jurisdiction to grant the requested relief.[2] To begin with, it is elementary that a pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return.[3] If we required certain high priority jurisdictional customers to pay rates which included an increment to compensate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

Moreover, even if this Commission had authority to increase the rates for high priority jurisdictional

[2] A petition may be summarily dismissed without an evidentiary hearing where there is no dispute of facts and the only issue is one of law. See *Citizens for Allegan County, Inc.* v. *F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969).

[3] See *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1943).

service to a level which exceeds the pipeline's costs plus a reasonable rate of return, there is no means whereby we could insure that low priority direct industrial customers, such as the electrical utilities which are the subject of MPSC's petition, would be "compensated" for their costs of alternate fuel. We have no jurisdiction whatsoever over the rates which are charged by pipelines for their sales of gas to direct industrial customers; our rate jurisdiction is limited to sales in interstate commerce for resale.[4]

Finally, we believe that MPSC's petition is, in essence, nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment. Our position on United's damage liability, if any, was fully explained in Opinion No. 647-A[5] and need not be elaborated upon herein. It will suffice to state that a pipeline's damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court.[6]

[4] Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b); *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[5] Opinion No. 647-A, 49 F.P.C. 1200 (1973), issued on May 30, 1973, in *United Gas Pipe Line Co.*, Docket No. RP71-29, *et al.*, appeal pending *sub nom. State of Louisiana, et al.* v. *F.P.C.*, 5th Cir. Nos. 73-3478, *et al.*

[6] See *International Paper Co.* v. *F.P.C.*, 476 F.2d 121 (5th Cir. 1973).

The Commission finds:

(1) Good cause exists to deny MPSC's petition for extraordinary relief and to terminate this proceeding.

(2) Acceptance of the petitions to intervene that were filed late will not result in any delay in determining this proceeding.

(3) The intervention of the above-named petitioners in this proceeding may be in the public interest.

The Commission orders:

(A) The petition for extraordinary relief filed by MPSC on August 5, 1974, is hereby denied.

(B) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, however*, that the participation of such interventions shall be limited to matters affecting asserted rights and interests as specifically set forth in each petition to intervene; and, *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that all or any such intervenor might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(C) This proceeding is hereby terminated.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. RP74-37-12

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and Don S. Smith.

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER GRANTING REHEARING FOR FURTHER CONSIDERATION

(Issued December 4, 1974)

On November 4, 1974, the Mississippi Public Service Commission (MPSC) and on November 18, 1974, Mississippi Power Company (MPCo) and Mississippi Power and Light Company (MP&L) filed applications for rehearing of the Commission's Order issued October 18, 1974, in said docket. That order denied MPSC's petition for extraordinary relief from United Gas Pipe Line's (United) curtailment plan. Petitioners object to the aforementioned order on several grounds. The issues raised are complicated and require further study.

The Commission finds:

In order to afford additional time for consideration of the issues discussed in the applications for rehearing, it is appropriate and necessary in the administration of the Natural Gas Act to grant rehearing of our Order issued October 18, 1974, in the aforementioned docket.

The Commission orders:

Rehearing of the Order issued October 18, 1974, is hereby granted for the limited purpose of further consideration.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., William L. Springer, and Don S. Smith.

Docket No. RP74-37-12

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER DENYING APPLICATIONS FOR REHEARING

(Issued February 13, 1975)

On November 4, 1974, the Mississippi Public Service Commission (MPSC) and on November 18, 1974, Mississippi Power Company (MPCo) and Mississippi Power and Light Company (MP&L) filed applications for rehearing of the Commission's Order issued October 18, 1974, in said docket. That order denied MPSC's petition for extraordinary relief from United Gas Pipe Line's (United) curtailment plan. Specifically, MPSC requested that the FPC initiate a proceeding to establish a method whereby high priority users would compensate the other pipeline customers who have been curtailed. MPSC also requested the Commission to direct United to deliver to three Miss-

issippi electric utilities, Mississippi Power Company (MPCo), Mississippi Power & Light Company (MP&L), and South Mississippi Electric Power Association (SMEPA) their contract entitlements of natural gas pending completion of the aforementioned proceeding or until the price of oil approximated that of natural gas.

Petitioners object to the order dated October 18, 1974, which denied its petition and terminated the proceeding. MPSC asserts that the Commission misconstrued the nature of its petition and the extent of its own jurisdiction. Petitioners maintain further that the Commission order relates to the Fifth Amendment prohibition against the taking of private property without due process of law inasmuch as curtailment deprives the electric utilities of natural gas to which they are contractually entitled.

At the time of issuing the aforementioned order, we understood the thrust of the compensation proposal as being that high priority jurisdictional customers would compensate low priority customers who were curtailed to a greater extent. However, we concluded that we could not approve the proposed scheme. Furthermore, we were aware that the Commission had previously approved a similar compensation scheme in a tariff of the Transcontinental Gas Pipe Line Corporation [1] and addressed this issue in two recent orders.[2]

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[1] Docket No. RP72-99, Order Approving Interim Settlement Agreement, issued November 15, 1972.

[2] Order Finding an Emergency on Transco's System and Denying Motion for Interim Settlement as to Curtailment

In these orders, we clearly set forth the reasons on which we based our conclusion that such compensation schemes are unacceptable as a matter of law and policy. We stated therein that a compensation scheme would allow higher rates unrelated to the pipelines' cost of service plus a reasonable rate of return; foster discriminatory rates among groups of consumers contrary to Section 4 of the Natural Gas Act; and cause overall results which are inconsistent with equity and the public interest. Our determination as to the unlawfulness of the compensation scheme on the Transco System is subject to review by the Court of Appeals; however, the scheme will remain in effect pending the court's determination of the legality of the procedure.

We will not consider the initiation or implementation of such a compensation scheme which we have found to be unlawful. Furthermore, our refusal to consider a compensation scheme in an appropriate rate schedule filing does not in our opinion, raise Fifth Amendment questions. Moreover, the implementation of a natural gas allocation program (curtailment plan) under such rate schedules is not proscribed by Fifth Amendment guarantees. The petitions for rehearing do not raise any new arguments which were not previously briefed fully, considered, and rejected by the Commission in our Order dated

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Rules, Docket No. RP72-99, issued November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement, Docket Nos. RP72-99 *et al.*, issued January 10, 1975.

October 18, 1974. The petitions for rehearing must be denied.

The Commission finds:

The assignment of errors and grounds for rehearing set forth in the petitions filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission Order dated October 18, 1974.

The Commission orders:

The petitions for rehearing of Order dated October 18, 1974, filed by the above-named petitioners are denied.

By the Commission. Commissioner Brooke, dissenting, filed a separate statement appended hereto.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

Docket No. RP74-37-12

(Issued February 13, 1975)

BROOKE, Commissioner, *dissenting*:

On October 18, 1974, the Commission denied the petition of the Mississippi Public Service Commission (MPSC) for extraordinary relief from the curtailment plan of United Gas Pipe Line Company (United) by initiating a proceeding to develop a procedure whereby those high priority customers of United would financially compensate lower priority customers for gas unevenly allocated in circumstances of equal contract entitlement.

MPSC's petition resulted from heavy curtailment of three Mississippi electric utility companies—Mississippi Power Company, Mississippi Power & Light Company and South Mississippi Electric Power Association, all of which have firm contracts with United under Federal Power Commission certificates. MPSC states that, although all firm customers are entitled to contractual volumes, discrimination results because the mechanics of United's plan allocates a greater portion of gas to some firm customers at the expense of other firm customers with equal entitlement.

MPSC is correct in its allegation that end-use curtailment allocates the available supply unevenly, ra-

ther than ratably, among firm customers. However, the U. S. Court of Appeals for the District of Columbia has affirmed the Commission's statement of policy in Order No. 467 which bases curtailments on end-use—and not contract entitlement.[1] This does not mean, in my opinion, that the Commission should ignore the possibility of a compensation procedure, based on some ratable allocation device, as another device in apportioning gas supplies. Certainly, the Commission has been most realistic and objective in considering petitions for specific volumetric relief to avoid irreparable harm, as provided for in Order No. 467 *et seq.*

In a series of recent orders[2] to which I have dissented, the Commission has determined as a matter of law and policy that compensation procedures of pipeline curtailment programs are *per se* illegal. I do not agree that such compensation plans are unlawful, and feel that prohibiting them is poor Commission policy. Pipelines and their customers have found such plans conducive to better supply manage-

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[1] *Pacific Gas and Electric Company, et al.* v. *Federal Power Commission,* No. 73-1358, *et al.,* U.S. Ct. of Appeals, D.C., opinion and order issued June 26, 1974.

[2] *Transcontinental Gas Pipe Line Corporation,* Docket No. RP72-99, order issued November 12, 1974; rehearing denied in part, January 10, 1975; *Consolidated Natural Gas Company,* Docket No. RP73-115, order issued January —, 1975; *Northwest Pipeline Corporation,* Docket No. RP74-49, order issued January —, 1975; *Columbia Gulf Transmission Corporation, et al.,* Docket No. RP73-851, *et al.,* order issued January —, 1975.

ment and flexibility in curtailment as envisioned by Order No. 467 *et seq.*

In *Pacific Gas and Electric Company,* the appellate court quoted and commented (Pages 14-16) as follows on certain parts of Order No. 467 which bear on MPSC's plea for hearing:

> "Order No. 467 does not establish a curtailment plan for any particular pipeline. The effect of the order is to inform the public of the types of plans which will receive initial and tentative FPC approval, but there is no assurance that any such plan will be finally approved. As the Commission stated:
>
> > When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.
>
> 49 F.P.C. at 85.
>
> [Order No. 467 is] not finally determinative of the rights and duties of a given pipeline, its customers or ultimate consumers; it expressly envisions further proceedings.
>
> 49 F.P.C. at 585.
>
> Many applicants seek clarification of Order No. 467 by Commission definition of all terms used, or modification of the substance of Order No. 467 by a reordering of priorities. These applicants err in treating Order Nos. 467 and 467-A as a rule of substance,

which precisely defines the curtailment rights and obligations of all pipelines and all pipeline customers. We ascribe no such effect to Order Nos. 467 and 467-A, for, as already stated, these Orders are intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases.

49 F.P.C. at 586. Not only will petitioners have an opportunity to challenge the merits of the proposed plan, they will also have an opportunity to demonstrate that the plan is inappropriate in particular circumstances.

As discussed below, Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a bindingrule without further proceedings directed towards curtailment problems on specific pipelines.

49 F.P.C. at 583.

The stated priorities are intended to be a safe starting point from which deviations may be made based on an evidentiary record.

Order Denying Motions for Reconsideration, Clarification or Modification of Order 467-B (April 25, 1973); Jt. App. at 80.

We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order No. 467 that the policy therein stated could, and would, be adjusted inappropriate cases where the hearing record so required.

49 F.P.C. at 584.

We, of course, recognize that extraordinary circumstances may preclude the strict adherence to the priorities established and, consequently, we will permit those persons who allege that their cirucumstances require such extraordinary treatment to file petitions for relief under Section 1.7(b) of our Rules of Practice and Procedure. Barring such circumstances, our review of those curtailment proceedings and our knowledge of the industry convinces us that the priorities-of-delivery set forth below should be applied to all jurisdictional pipeline companies during periods of curtailment.

49 F.P.C. at 85-86.

This does not mean that the parties may not propose or the commission may not adopt variations on the Sec. 2.78(a) plan, but there must be evidence in the record to support any such variations. Nor does it mean that adversely affected pipeline customers may not claim a right to special relief from the operation of a Sec. 2.78(a) plan, but in such instances there must be evidence to support any such claim. In this way, Sec. 2.78(a) will assist the parties and the Administrative Law Judge in arriving at a curtailment plan which will

meet the problems created by diverse needs for gas in the face of a nation-wide gas shortage and at the same time be adapted to the peculiarities, if any, of the particular pipeline system involved."

It is apparent that the broad language of Order No. 467 counsels the desirability of curtailments tailored to individual pipelines and their load and operating characteristics.

The Commission's current holding that any compensation procedure is unlawful as a matter of law and undesirable as a matter of policy was made absent any evidentiary consideration based on a litigated proceeding or any conclusions based on comments to a rule-making. The transfer of gas, with appropriate compensation, from one pipeline customer to another to ameliorate curtailment is as legitimate a response to an emergency as the 60-day procedures set forth in 2.68, 157.29 and 157.22.

Honoring MPSC's request for a hearing would initiate the necessary evidentiary proceeding precedent to an objective decision. An alternate approach would be through a rule-making or responses to a statement of policy. Only through appropriate hearing or rule-making can MPSC's case be fairly and equitably judged in light of current gas supply and economic condition.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Docket No. RP72-99

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER FINDING AN EMERGENCY ON TRANSCO'S SYSTEM AND DENYING MOTION FOR INTERIM SETTLEMENT AS TO CURTAILMENT RULES

(Issued November 12, 1974)

On September 30, 1974, Transcontinental Gas Pipe Line Corporation (Transco) filed a motion requesting Commission approval of an interim settlement agreement setting forth a curtailment plan to be implemented on the Transco system for a one year period beginning on November 16, 1974, and terminating on November 15, 1975. Notice of this motion was issued on October 4, 1974, 39 *Fed. Reg.* 36923 (October 15, 1974), whereupon comments were filed by several of Transco's customers.

On the basis of the motion, the testimony attached thereto, and the comments filed thereon, we are compelled to deny Transco's motion. In our judgment, the

proposed interim curtailment plan is unjust, unreasonable, discriminatory, and contrary to the public interest. The reasons for our decision will follow. Preliminarily, however, it may be helpful to review the extensive and complex background of this case.

I. *Procedural Background*

On May 17, 1971, in response to Commission Order No. 431, Transco filed a proposed permanent curtailment plan. By order dated May 27, 1971, we suspended the implementation of that plan for one day, and provided for a hearing to determine its lawfulness.

Subsequently, the parties to this proceeding negotiated their first interim settlement agreement which proposed an emergency gas curtailment plan to be followed from November 16, 1971, through November 15, 1972. One of the provisions of this agreement was as follows:

> Transco agrees that, on or before December 15, 1971, it will advise its customers, interested State Commissions, and the staff of this Commission of its long-term curtailment plans, and will submit revised tariff sheets setting forth such long-term curtailment rules. Additionally, Transco agrees that such new tariff sheets will be filed with this Commission no later than January 17, 1972, but will not be made effective prior to November 16, 1972.[1]

[1] See p. 3 of Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971.

The proceedings involving Transco's May 17, 1971 filing were to terminate upon the filing of a permanent plan in accordance with the agreement.

Accepting the representations of the parties at face value, we issued an order on November 15, 1971, conditionally approving the settlement "without prejudice to any findings or order of the Commission in any future proceeding involving Transco's * * * tariff provisions." [2]

On January 17, 1972, Transco filed a proposed permanent plan which was suspended and made the subject of hearings. Thereafter, however, the parties entered into a second interim curtailment plan to be followed from November 15, 1972, until November 15, 1973. Given the circumstances then prevailing on Transco's system, and in view of a commitment by Transco to file a permanent plan on or before May 1, 1973, we issued an order on November 15, 1972, approving the interim plan as just, reasonable, and in the public interest.[3]

Commitments notwithstanding, Transco did *not* file a permanent plan with the Commission on May 1, 1973; it filed, instead, a motion requesting that the interim plan be extended for yet *another* year. On May 23, 1973, we rejected this motion as failing to comply with Transco's agreement, and directed that an appropriate curtailment plan be filed on or before

[2] Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971, p. 4.

[3] Order Approving Interim Settlement Agreement, issued November 15, 1972, p. 8.

July 1, 1973.[4] In that order, we advised Transco that it should "give consideration to Order 467-B," and, further, that any plan not in conformity with Order 467-B "may be found to be discriminatory or preferential, and Transco undoubtedly recognizes the risks * * *."[5]

On June 29, 1973, Transco submitted a proposed permanent plan which, with few exceptions, embodied the end use priorities of Order No. 467-B. Soon thereafter, however, on July 6, 1973, Transco submitted a renewal of its motion for a one-year extension of the interim plan.

On July 30, 1973, we issued an order which suspended Transco's proposed permanent plan and permitted its effectuation on November 16, 1973, pending the completion of hearings as to its lawfulness.[6] We also denied reconsideration of Transco's request for a one year extension of the interim plan. As a result, several petitioners filed applications for rehearing alleging that Transco's proposed permanent

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[4] Order Denying Motion for One-Year Extension of Interim Curtailment Plan and Providing for Filing of Curtailment Plan, issued on May 23, 1973.

[5] *Id.* at p. 2.

Note: Order No. 467-B was affirmed in full in *Pacific Gas and Electric Company* v. *F.P.C.*, —— U.S.App.D.C. ——, —— F.2d —— (D.C. Cir. No. 73-1358, decided June 26, 1974).

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[6] Order Denying Motion for Reconsideration, Permitting Intervention, Fixing Date of Hearing, Specifying Procedures, and Suspending Proposed Revised Tariff Sheets, issued July 30, 1973.

plan was not voluntarily filed, but rather was the consequence of coercion by this agency. In our order of September 17, 1973, we emphatically denied these charges, and made it clear that—

> * * * our order in this proceeding neither ordered, directed, nor prescribed either directly or indirectly, any specific filing on the part of Transco.[7]

With reference to Order No. 467-B, we further stated that all pipelines remain free to file curtailment plans in whatever form they choose.[8]

II. *Stay Orders Issued By The United States Court Of Appeals For The District Of Columbia Circuit*

On September 18, 1973, Consolidated Edison Company of New York, a large Transco customer which uses much of its gas for low priority boiler fuel, filed a petition to review our orders, as well as a motion to stay those orders and continue the interim plan. Pursuant to this motion, and others subsequently filed, the D.C. Circuit, on November 9, 1973, issued an order staying the Commission's orders until further order of the court. Since the effect of the Court's stay was unclear, the Commission thereafter filed a petition for rehearing and clarification. As a result, on December 14, 1973, the Court issued an order stating, *inter alia*:

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[7] Order Denying Rehearing, issued September 17, 1973.

[8] *Id.* at p. 3.

By our order of November 9, 1973, we stayed the effect of the respondent's order dated May 23, 1973, and respondent's order of July 30, 1973. We did not intend, however, to prevent respondent from holding hearings to consider a permanent plan for Transco.

In our order of November 9, 1973, we stated that we wished to preserve the status quo. By this, we meant that we wished to continue in effect the situation as it existed on May 23, 1973, date of the first order which petitioners have requested us to review. Accordingly, Transco's then existing interim curtailment plan is to continue in effect *until further order of this Court*. Insofar as the respondent Commission's powers are concerned, they are no different than during the existence of the interim plan that we continued in effect by our order of November 9, 1973. (Emphasis added).

In the latter part of this summer, two of Transco's customers, Philadelphia Electric Company and Philadelphia Gas Works, filed motions with the Commission requesting that Transco be ordered to file a new interim plan, based upon the end use priorities of Order No. 467-B, to be followed for one year commencing with November 16, 1974. In these motions it was alleged that the currently effective pro rata plan would not be sufficient during the impending winter to protect high priority customers. Specifically, Philadelphia Electric alleged (Motion, p. 2):

> * * * [T]he interim pro-rata curtailment plan under which Transco is presently operating will no longer provide the protection to firm markets that it has in the past due to substantially increased curtailment levels. In all likelihood this plan will not afford protection to the high priority of service categories 1 and 2 [*i.e.*, (1) residential, small commercial, and (2) large commercial, firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements].[9]

Moreover, Philadelphia Electric complained (Motion, p. 3):

> * * * [T]he prospect of extensive curtailments of P.E. Co.'s firm industrial markets with attendant loss of jobs and productivity forbodes such serious consequences that P.E. Co. and its customers must be afforded a timely opportunity to take all prudent steps necessary to alleviate the impact of cuurtailments. Since other forms of energy are in short supply, including propane and low sulphur oil, an atmosphere of uncertainty regarding implementation of pipeline curtailment procedures is intolerable.
>
> P.E. Co. submits that the Commission has before it substantial evidence in the instant record upon which to issue an order that emergency steps are necessary to afford high priority categories, 1 and 2, protection from curtailment this coming winter. Furthermore, this evidence compels the issuance of an order requiring Transco to implement a 467-B end use curtailment plan

[9] Bracketed material supplied on the basis of Order No. 467-B.

for the forthcoming winter on an emergency interim basis.

Notwithstanding these allegations, and notwithstanding any justification they might have on the basis of the record, we recognized our inability to provide any meaningful response as long as the Court's stay was effective. Rather than ignore these claims of impending harm, however, we filed a motion with the D.C. Circuit requesting that the Court permit the Commission to examine these complaints, examine the record, and "take any action which, on the basis of the evidence presently available, is necessary to assure just, reasonable, and nondiscriminatory curtailment on an interim basis for the forthcoming winter * * *." [10]

On October 4, 1974, the Court of Appeals granted the Commission's motion for clarification, but it explicitly refused to permit any action which, in the Commission's judgment, is required to protect the public interest. Specifically, the Court ordered:

> * * * Transco's interim curtailment plan which is in effect on May 23, 1973 and which has continued in effect since that time will remain in effect until the administrative proceedings regarding Transco's permanent plan have been completed and the Commission implements that plan.
>
> Our orders of November 9 and December 14 do not, however, prevent Transco from submit-

[10] Motion of Federal Power Commission for Clarification, p. 14.

> ting a new interim plan to the Commission under § 4 of the Natural Gas Act, nor do they affect the Commission's powers to implement such a plan or to suspend it pending hearings.
>
> Therefore, the curtailment plan in effect for the coming Winter will be *either* the interim plan currently in effect *or* such new interim plan as Transco may submit and the Commission may approve. The Commission's power to respond to petitions for emergency relief from the curtailment plan in effect are no different than they have always been under the curtailment plan which this order continues in effect. [Emphasis added]

Thus, the Commission has been given two choices: (1) continue the past interim plan which is based upon a pro-rata reduction in contractual entitlements, or (2) approve *in toto* the proposed interim settlement plan which is based, in part, upon a pro rata reduction of contractual entitlements. If we find that neither plan is just and reasonable, that both will be discriminatory, or that both will cause irreparable harm, we are not free to take remedial action.

III. *Current Emergency*

For those who have witnessed the steady decline in Transco's ability to meet system requirements, it can scarcely be denied that Transco's customers are faced with an emergency which threatens irreparable harm. In its most recent Form 16,[11] filed with the Com-

[11] Form 16 reports are filed with the Commission twice each year, pursuant to Order No. 489, 50 F.P.C. 561 (1973).

mission on September 30, 1974, Transco projects that from September of 1974 through August of 1975, its firm requirements of 1,107,000,000 Mcf will be curtailed by 307,364,000 Mcf, or approximately 28%. For the winter period, extending from November of 1974 through March of 1975, Transco projects that its firm requirements of 509,834,000 Mcf will be curtailed by 100,784,000 Mcf, or approximately 20%.

The magnitude of the crisis on Transco's system is brought into even greater focus when one considers the petitions for extraordinary relief which have been filed. See, *e.g.* Petition of Stauffer Chemical Company for Interim and Permanent Extraordinary Relief from Curtailment Plan, filed on September 6, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Eastern Shore Natural Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 10, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Farmers Chemical Association, Inc. for Temporary Extraordinary Relief, filed on October 16, 1974, in Docket No. RP75-16-2; Petition of South Jersey Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 17, 1974, in Docket No. RP75-16-3; Petition of New Jersey Zinc Company for Extraordinary Relief from Curtailment, filed on November 5, 1974, in Docket No. RP75-16-4.

Thus, the need for prompt action by this Commission is manifest. As the Fifth Circuit has stated:

> * * * the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective *interim* curtailment action in the exigencies presented by gas shortages.[12] [Emphasis added]

Interim curtailment regulation has been traditionally accomplished through the procedural devices of either Sections 4 or 5 of the Natural Gas Act. Under Section 4, the Commission may accept and suspend a company-filed plan, permitting its effectuation pending the completion of hearings. Under Section 5, the Commission may prescribe an interim plan for the company if, after hearings, it determines the existing plan to be unjust and unreasonable. The validity of both procedures has been sustained in full by the Supreme Court. *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621, 643-647 (1973).

In the present case, however, our authority, as defined by the Supreme Court in *LP&L*, has been severely circumscribed by the D.C. Circuit. We have no power to permit the effectuation of Transco's permanent plan which was filed under Section 4 on June 29, 1973, and suspended by the Commission on July 30, 1973. Moreover, in view of the Court's stay, we have no power to prescribe an interim plan under Section 5, though the Supreme Court has said that "even when concluding a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan. *F.P.C.* v. *Natural*

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[12] *Atlanta Gas Light Co.* v. *F.P.C.*, 476 F.2d 142, 150 (5th Cir. 1973); See, also, *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972).

Gas Pipeline Co., 315 U.S. 575 (1942)." [13] Notwithstanding these limitations on our ability to act, however, we proceed with the findings which are required by the record.

IV. *The Proposed Interim Plan*

A. *Analysis*

The proposed interim settlement is, of course, a result of compromise by the customers participating in this proceeding. Those customers whose use of gas is relatively inferior, in terms of the public interest, obviously desire pro rata curtailment on the basis of contractual entitlements. In contrast, high priority customers would be more satisfied with the end use priorities of Order No. 467-B. To resolve the conflict, they have agreed to split the loaf. Specifically, the proposed interim plan assigns a seasonal or annual entitlement to each customer. These entitlements were determined on the basis of 50% pro rata curtailment and 50% curtailment under an Order No. 467-B and use plan, with certain adjustments for residential, commercial, and essential industrial requirements.[14]

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[13] *F.P.C.* v. *Louisiana Power & Light Company, supra* at 644, n. 18.

[14] For example, consider a customer whose contract demand is 20,000 Mcf per day. On a day of 20% curtailment, that customer would be entitled to 16,000 Mcf under a pro-rata plan. During the same degree of curtailment under the Order 467-B end use plan, however, the customer may be entitled to less, which, for purposes of hypothesis, we shall assume to be 10,000 Mcf. Under the proposed interim plan, the customers' entitlement would be 13,000 Mcf which is the result of addi 50% of the pro rata entitlement (8000 Mcf) and 50% of t e end use entitlement (5000 Mcf).

The heart of the proposed plan, however, is not in the curtailment procedure outlined in Article II of the settlement, but rather in the "Compensation for Curtailment" provisions of Article III. Under these provisions, those customers who suffer the most curtailment will receive compensation, while those curtailed least will provide that compensation. More specifically, Article III provides:

> * * * CD, ACQ and firm direct industrial customers being curtailed greater than the average curtailment of such customers shall receive credits to their bills from Transco of 50 cents per Mcf of such greater curtailment and the bills of customers in the same categories being curtailed less than the average curtailment of such customers shall be debited with an amount of 50 cents per Mcf of such lesser curtailment. In addition, it is agreed that at the end of the winter season, 25 cents shall be credited to the bills of customers for each Mcf which such customer had been curtailed greater than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use and 25 cents shall be debited to the bills of customers for each Mcf which such customers had been curtailed less than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use.

Insofar as the other material provisions of the proposed settlement are concerned, Article IV provides that the agreement shall terminate on November 16, 1975; Article V provides that extraordinary relief will not be sought by Transco's customers through the period ending November 15, 1975, except for certain unforseen circumstances; Article VI provides for dismissal of pending court cases,[15] upon Commission approval of the settlement; Article VII provides that the interim settlement will not be challenged on environmental grounds; and Article VIII requires Transco to furnish its customers periodic curtailment reports.

B. *Findings*

If agreement among the majority of participating customers was the proper measure of the public interest, we would be constrained to approve the settlement now before us. However, our responsibilities under the Natural Gas Act require something more than the counting of votes. Indeed, as the Court of Appeals for the District of Columbia Circuit properly stated in *Michigan Consolidated Gas Company* v. *F.P.C.*, 108 U.S.App.D.C. 409, 283 F.2d 204 (1960), certiorari denied, 364 U.S. 913 (1960):

> In viewing the public interest, the Commission's vision is not to be limited to horizons of

[15] *Consolidated Edison Company of New York, Inc., et al.* v. *F.P.C.*, D.C. Cir. Nos. 73-1999 and 73-2017.

> the private parties to the proceeding (283 F.2d at 226).[16]

Viewed in this perspective, we cannot place our imprimatur upon the settlement. To the contrary, we are compelled to find that the proposed interim plan is unjust, unreasonable, discriminatory, and contrary to every element of the public interest.

We believe that the proposed scheme of compensation, which is the cornerstone of the settlement, is patently unlawful and beyond our jurisdiction to either approve or enforce. In essence, it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return. We have recently rejectd a similar scheme in *United Gas Pipe Line Company*, Docket No. RP74-37-12 (order issued October 18, 1974), and what we said there applies equally well to this case (*mimeo* at 2-3):

> * * * [A] pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return. If we required certain high priority jurisdictional customers to pay rates which included an increment to com-

[16] See, also, *Scenic Hudson Preservation Conference* v. *F.P.C.*, 354 F.2d 608, 621 (2nd Cir. 1965), certiorari denied, *sub. nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). Cf. *Pennsylvania Gas & Water Company* v. *F.P.C.*, —— U.S.App. D.C. ——, 463 F.2d 1242 (1972); *Greater Boston Television Corp.* v. *F.C.C.*, —— U.S.App.D.C., 444 F.2d 841 (1970).

> pensate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

In addition to being unlawful because of its departure from the concept of cost-based pipeline rates, the proposed compensation scheme would foster undue discrimination in rates among similarly situated customers, contrary to Section 4(b) of the Act, 15 U.S.C. § 717c(b). For example, consider a situation in which two customers in the same zone, Company A and Company B, have identical needs of 10,000 Mcf on a given day. Because of differences in contract, however, Company A's entitlement under the curtailment program is only 8,000 Mcf per day, whereas Company B's entitlement is 12,000 Mcf. Under the proposed compensation scheme, Transco would be permitted to deliver 10,000 Mcf to each customer on that given day, but Company A's rates could be *increased* by $1,500 that day (2000 Mcf x .75 per Mcf in excess of entitlement), whereas Company B's rates could be *decreased* by $1,500 that day (2000 Mcf x .75 per Mcf below entitlement).

Putting the discrimination issue aside, the proposed compensation plan also contemplates circumvention of the rate change requirements of Section 4(d) of the Act, 15 U.S.C. § 717c(d):

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the parties.

With each brokering of a contract entitlement under the proposed plan, there would be a change in jurisdictional rates, *i.e.* one customer's rates would be increased, while another's would be decreased. To permit this without compliance with Section 4(b), would require a Congressional amendment. *Episcopal Theological Seminary* v. *F.P.C.*, 269 F.2d 228 (D.C. Cir. 1959), certiorari denied, *sub nom. Pan American Petroleum Corp.* v. *F.P.C.*, 361 U.S. 895 (1959).

Finally, we believe that implementation of the proposed compensation plan, if approved, would have serious, and obviously unforseen, jurisdictional repercussions upon Transco's customers. In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce.[17] Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. § 717f(c). If such a certificate were sought, we would be required to examine all issues bearing upon the public interest, including the proposed rate of the sale.

We must acknowledge that in our previous orders allowing the currently effective interim plan to operate through November 15, 1973, we approved a sim-

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[17] Cf. *United Gas Improvement Co.* v. *Continental Oil Co., et al.*, 381 U.S. 392 (1965).

ilar compensation scheme which provided that customers who are exempted from curtailment on a given day would be debited with a 25¢ surcharge per Mcf, whereas customers which are curtailed more than the announced level would be credited with 25¢ per Mcf. Viewed in the light of the circumstances existing at that time, we regarded the compensation feature as nothing more than a billing arrangement. Closer scrutiny, however, convinces us that it was something more; indeed, it was the harbinger of a full-scale program which would permit the interstate brokering of contractual entitlements without Commission approval. Whatever our judgments of the past may have been, we cannot now approve a scheme which promises (1) higher rates which are based upon the market value of contract entitlements, rather than the pipeline's cost of service plus a reasonable rate of return, (2) discriminatory rates among customers of the same class, (3) violation of the notice provisions of Section 4(e) of the Act, and (4) interstate sales for resale of natural gas without rate and certificate approval by this Commission.

Having thus concluded that the proposed interim settlement is unlawful, discriminatory, and contrary to the public interest, we are faced with the fact that the currently effective pro-rata curtailment plan will continue in effect during the impending winter, unless the courts intercede. This is unfortunate, indeed, as we will demonstrate.

V. *The Currently Effective Interim Plan*

A. *Analysis*

The currently effective interim plan, which has been continued by the D.C. Circuit beyond any period anticipated by Transco, is based upon contractual considerations, rather than end use. It provides, first, for the curtailment of all of Transco's interruptible sales, and, second, for the curtailment of firm direct and major resale customers on a pro rata basis, but only to the extent that interruptible services of the resale customers are curtailed. Through an exemption procedure in winter, individual customers are entitled to have curtailment eliminated or reduced in order to protect firm customers. Finally, if firm service of customers cannot be met, priorities are established to permit further curtailment for the protection of human needs customers.

As noted above, the currently effective plan also has a compensation provision whereby customers who are exempted from curtailment on a given day are debited with a surcharge of 25¢ per Mcf, whereas customers which are curtailed more than the announced level of curtailment are credited with 25¢ per Mcf.

B. *Findings*

In our orders of May 23, 1973, July 30, 1973, and September 17, 1973, we essentially found that any further prolongation of the currently effective interim

plan would not be in the public interest. We remain of that view.

To begin with, we believe that the legal impediments inherent in the compensation plan of the proposed settlement are also inherent in the compensation feature of the currently effective plan. Our rationale has been set forth above and need not be reiterated.

Secondly, we do not believe that it is in the public interest to continue interim curtailment on a pro rata basis for the *fourth consecutive year*. On more than one occasion,[18] we have indicated that curtailment should be based upon end use considerations, in the absence of compelling evidence demonstrating that some other plan is just, reasonable, and nondiscriminatory. Moreover, the importance of end use in the promulgation of curtailment plans, has been consistently recognized by the courts. The Supreme Court has taken note of the need to protect "schools, hospitals, and homes completely dependent on a continued natural gas supply for heating and other domestic uses," [19] and the D.C. Circuit has recently agreed that "end use is a most appropriate consideration for purposes of a curtailment plan." [20]

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[18] See, *e.g.*, *United Gas Pipe Line Company*, Docket Nos. RP71-29, *et al.*, Opinion No. 647, 49 F.P.C. 179 (1973); *Arkansas Louisiana Power and Light Company*, Docket No. RP71-127, Opinion No. 643, 49 F.P.C. 53 (1973).

[19] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1973).

[20] *American Smelting and Refining Company* v. *F.P.C.*, —— U.S.App.D.C. ——, 494 F.2d 925 (D.C. Cir. 1974), certiorari denied *sub nom. Southern California Gas Co., et al.* v. *F.P.C.*, —— U.S. —— (October 14, 1974).

We do not say, of course, that an end use plan is the only type of plan which we will consider for Transco on a permanent basis; our decision on a permanent plan will be the one that is required after a full examination of the extensive record in this case. We do believe, however, that given the evils inherent in a pro rata plan which is based upon private contracts rather than public interest, curtailment on the basis of end use priorities affords the best interim protection for the consumers.

With the increased level of curtailment which is projected for the coming winter, it is clear that the currently effective interim plan will place firm service, including service to high priority customers, in jeopardy. This fact is not only borne out by the many petitions for relief currently pending before us, but it is candidly acknowledged by the sworn and unchallenged testimony of Transco's own witness, Mr. C. H. Mullendore, Jr., Vice President of Marketing:

> * * * I am not able to give assurance that, at the projected deeper levels of curtailment on Transco's system, the present interim plan would operate beyond November 15, 1974 in a manner to accomplish its basic objective of protecting all firm loads. This is so because the plan depends upon actual market conditions and there is no built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed

to protect the firm loads of the rest of the system.

For the reasons heretofore stated, we cannot lawfully approve the proposed interim settlement. There is, however, a plan which will alleviate Transco's concern, and that is the proposed plan which was filed by Transco on June 29, 1973, suspended by our order of July 30, 1973, and stayed subsequently by the D.C. Circuit. Unlike the currently effective interim plan, that plan *does* have a "built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed to protect the firm loads of the rest of the system." Specifically, the plan which was suspended by our order of July 30, 1973, requires that all large interruptible service, whether direct or indirect, be curtailed prior to any curtailment of firm service. Moreover, this plan embraces a system of end use priorities which are based upon public interest considerations rather than the vicissitudes of contract. Residential and small commercial customers are given the highest protection, regardless of the distributor's agreement with Transco. Furthermore, essential industrial uses, such as those for feedstock, plant protection, process needs, and pipeline customer storage injection, are afforded higher protection than other industrial uses.[21]

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[21] We recognize that the plan suspended by our order of July 30, 1973, also contains a compensation scheme providing that customers which receive more than the system average shall pay 25¢ per Mcf for such over supply, while those receiving less shall obtain a credit of 25¢ per Mcf for such under supply. These provisions present no immediate problem, however, because they cannot be implemented without prior certificate and rate approval by this Commission. See discussion at pages 13-14.

Unfortunately, however, this plan cannot be implemented for the present winter because our suspension order permitting its effectuation as of November 16, 1973, has been stayed by the Court of Appeals. With the hope that this impediment can be alleviated, and that threatened irreparable harm for the impending winter can be avoided, we are directing our Solicitor to immediately seek a dissolution of the stay. We cannot overemphasize the importance of an expeditious decision on this matter. In our judgment, the interim plan to be followed for this winter—whatever its nature—must be placed into effect on or before November 30, 1974. Transco and its customers must be given sufficient time to prepare for the harsh months ahead. Moreover, a switch of curtailment plans during mid-winter will create operational chaos and exacerbate, rather than alleviate, irreparable harm.

In closing, we must confess to a sense of frustration which arises out of our duty to regulate Transco's curtailments, on the one hand, and our inability to regulate, on the other, as a result of the Court's stay. We are facing a winter in which nationwide curtailment will be *81% deeper* than last winter. We are besieged with petitions alleging that pro rata curtailment during this winter will wreak irreparable harm upon high priority customers. We are

burdened with petitions for extraordinary relief. We are told by Transco's own witness that the currently effective plan will not protect firm loads during the impending winter. As an alternative, we are not offered a fair and equitable curtailment plan, but a brokering scheme whereby customers with low contractual entitlements are at the mercy of those with higher entitlements. And when the wheel comes full circle, we have nothing but a Hobson's choice: Approve an unlawful plan, or disapprove it and allow the existing unlawful plan to continue in effect.

In defining the curtailment jurisdiction of this Commission,[22] the Supreme Court has reaffirmed the wisdom of its earlier decision in *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1941):

> Agencies * * * are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.

The circumstances of this case have been set forth above. It will suffice to say, at this juncture, that, unless our freedom to protect Transco's customers is restored, serious and irreparable harm will ensue.

The Commission finds; in addition to the foregoing; that:

(1) The proposed interim settlement agreement as to curtailment rules is unlawful, unjust, unreasonable, discriminatory and contrary to the public interest. Accordingly, it should be rejected.

[22] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

(2) The currently effective interim curtailment plan, being implemented pursuant to orders of the United States Court of Appeals for the District of Columbia Circuit, will not adequately protect high priority service on the Transco system during the impending winter.

(3) High priority customers on the Transco system will be exposed to serious and irreparable harm during the impending winter unless the Commission is free to permit the effectuation of the end use plan suspended by its order of July 30, 1973, and to take such further action as the public interest may require.

The Commission orders:

Transco's motion for approval of an interim settlement agreement as to curtailment rules is denied.

By the Commission. Commissioner Springer, concurring, filed a separate statement appended hereto.

Commissioner Brooke, dissenting, filed a separate statement appended hereto.

[SEAL]

KENNETH PLUMB,
Secretary.

TRANSCONTINENTAL GAS PIPE LINE CORP.

Docket No. RP72-99

(Issued November 12, 1974)

SPRINGER, Commissioner, *concurring*:

I concur in the denial of approval for the interim settlement agreement, but do not agree necessarily with the finding that the end use plan suspended on July 30, 1973, is the only solution for the Transco system.

/s/ William L. Springer
WILLIAM L. SPRINGER
Commissioner

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP72-99

(Issued November 12, 1974)

BROOKE, Commissioner, *dissenting*:

I have grave fear that Commission rejection of the proposed Interim Settlement Agreement (ISA), which represents a singular accomplishment arrived at through reasonable compromise and with remarkable unanimity among numerous and disparate parties, could well presage a calamitous situation on the Transco system this winter.

It may well be, as Transco observed in its reply comments on the proposal, that the broad support or non-opposition of virtually all parties reflects a belief that the 50 per cent pro-rata and 50 per cent end-use plan "will permit them to survive during the coming year." Use of the word "survive" is appropriate because the self-interest thread of "survival" is woven throughout comments to the settlement.

The ISA, by adjusting varying positions, interests and issues, eliminates the daily uncertainty of the old pro rata plan; recognizes the Commission policy set forth in Order No. 467-B; continues to provide a high degree of planning certitude available under the old interim plan; embodies a gradual and reasonable shift, under present circumstances, to end-use curtailment; provides stability in its emergency relief moratorium (a provision now of arguable value),

and assures distress compensation to severely curtailed distribution companies. The ISA would replace the present interim plan, to be effective from November 16, 1974, to November 15, 1975. It should be accepted by the Commission.

The proposal before us is a relatively simple document considering the gravity of Transco's system supply situation, which apparently has worsened since the ISA was filed with the Commission, but more comment on that later. Article II of the ISA states:

> "The general objective of the settlement curtailment procedures is to protect, within the limits of Transco's estimated available gas supply, natural gas service to essential high priority consumers while at the same time attempting to alleviate adverse economic, social and gas supply impacts on Transco's system resulting from projected curtailments. To this end, the agreed upon curtailment procedures provide for curtailment of Transco's share of the requirements of its larger firm customers initially on the basis of 50% pro-rata curtailment and 50% end-use curtailment in accordance with the Commission's Order No. 467-B set of priorities. However, certain exceptions have been made to this general method to provide, together with other available anticipated supplies, protection of service for residential and commercial requirements, storage injection requirements and essential firm industrial requirements. This latter category is defined as those industrial requirements dependent upon natural gas for feedstock, plant protection and process use which would not receive gas

> service from any source in the absence of the exception."

The agreement clearly indicates a movement by Transco and its customers away from the old pro-rata curtailment plan and toward the end-use format of Order No. 467-B (Order issued March 2, 1973). The diversity of the parties, each with various interests to protect, infers strong opposition to a straight 467-B program, and I deem it a mistake to ignore the recognition inherent in 467-B that reasonable and justifiable deviations would be permitted in curtailment programs.

Order No. 467-B commented (Page 3):

> "We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order 467 that the policy therein stated could, and would, be adjusted in appropriate cases where the hearing record so required."

The Commission later referred to "where deviation therefrom (Docket 469 policies) is required by the evidence." Order No. 467-B also acknowledged "general agreement" with the thesis "that a general rule is inappropriate and that each pipeline system should be treated on an individual basis." The Commission then stated a policy conclusion that end use, not contract entitlement, should be controlling. However, the policy should be applied reasonably and practicably.

In the more than 18 months since the end-use priorities of 467-B were enunciated, the nation's

natural gas supply situation has worsened and curtailments have deepened. Transco's supply shortfall has increased since the settlement was negotiated because on October 15, 1974, Transco customers were notified that the available gas supply during the 1974-75 settlement period would be about 20 Bcf less than the volumes used to compute the basic entitlements in Schedules 2 and 3 of the ISA.

It is apparent from comments that various parties regard this reduction in the volumes Transco estimated would be available for the 1974-75 settlement year as negating their obligation under Section V to refrain from filing petitions for extraordinary or emergency relief from the interim settlement. It was the intent of Article V that emergency relief would not be sought "except for changes in presently foreseen circumstance . . ." It is difficult to estimate how many relief petitions will be filed by accepting the settlement in the circumstances of this further erosion of Transco's supply, but rejection of the settlement, in my opinion, most assuredly will open the floodgates. The situation undoubtedly will be further exacerbated when the full impact of Commission rejection of the La Gloria Field settlement is measured, (*Hilda B. Weinert and Jane W. Blumberg et al*, Docket Nos. G-2730 *et al*, Order issued October —, 1974), an action to which I dissented.

Rejecting the ISA puts the Commission in the potential position of having to adjudicate a flood of petitions on an individual basis whereas its acceptance would have recognized that Transco and its

customers were making deep concessions in order to treat supply shortages on a system-wide basis and to render some meaningful stability through the moratorium. As it is, treating individual petitions as a "rob Peter to pay Paul" proposition can only lead to unmanageable administrative procedures, encourage protective filings, compel lengthy and costly litigation, and result in discrimination and gross inequities.

I have often criticized the regulatory delay which comes from wrapping administrative law in the trappings of a true court of law. I do not believe it the purpose of regulation to merely sanction managerial decisions, nor do I believe the regulatory scheme requires us to ignore the reality that people most involved frequently know better how to run their businesses than the FPC. If the solution conforms to the public interest, and has record support, we are foolish to turn it down, especially when extreme sacrifice is being made, as in this case.

The Commission Staff Counsel's comments of October 18, 1974, correctly delineated the Commission's court-prescribed options without reference to the possibility, although wholly improbable in my opinion, of a Commission-imposed plan based on the record within a reasonable time. I also concur in Staff's observation that the "Federal Power Commission regulates pipeline curtailments on a case-by-case basis and considers the supply-demand situation of each pipeline separately." (Staff Comments, Page 4) I would also agree that the Commission is without

authority to expropriate the supplies of one pipeline to benefit another, but I disagree with its statement of October 15, 1974, regarding the insufficiency of the record to support the tendered settlement.

Pennsylvania Gas and Water Company and North Penn Gas Company observed in its statement of October 18 that "the evidentiary support for the settlement exists in plentitude in the evidentiary record already compiled in the proceeding," and emphasized that "the settlement agreement was not developed until after the close of the record and is based on facts and principles fully explored in the record." If 6,000 pages of testimony and more than 100 exhibits do not provide a complete record then a complete record is impossible of compilation!

In its comments of October 18, Staff detailed operation of the present plan, due to expire on November 15, 1974, and concluded that its continued operation would not be in the public interest. However, Staff did give the new proposal its tentative support, conditioned "upon the representation of the parties that the gas volumes allocated by the ISA will provide protection for residential, commercial and essential industrial markets." Because of Transco's downward supply revision, Staff now opposes the interim settlement agreement as unprotective of high priority customers and urges the Commission to formulate an interim curtailment procedure based on end-use priorities.

The proposed settlement constitutes clear recognition that the many complex issues to be adjudicated

on their merits and supporting evidence could not be decided and a permanent curtailment plan determined prior to November 15, 1974. Thus, the parties turned to extensive negotiations to arrive at a further interim settlement which would, as equitably and as fairly as possible, allocate Transco's natural gas supply shortfall among all customers.

The State of North Carolina was particularly disturbed by the impact of any plan which required it "to bear a disproportionate share of what is clearly a national problem and will lead to unjustifiable discrimination against North Carolina's citizens and industries." (North Carolina's Comments, October 18, 1974; Pages 1-2) North Carolina is entirely dependent on Transco for its natural gas supplies, which imposes a somewhat peculiar curtailment situation which the State regards as discriminatory unless (1) account is taken of those Transco customers also supplied by other pipelines with less curtailment, and (1) the Commission "direct(s) the transfer of gas, at an appropriate rate, from pipelines with a more favorable supply" to those in deep distress. I, of course, do not believe the Natural Gas Act gives the Commission this power of supply allocation. Although it will be cut 39 per cent below contract entitlement during the settlement period, North Carolina regards the proposal as not an "unreasonable short-term compromise" with which "we are willing to attempt to live . . ." (North Carolina Comments, Page 2). North Carolina's position is especially disturbing and probably will become untenable should the reduction

in Transco's La Gloria volumes be significant. In that event, we can anticipate intolerably severe economic dislocation, affecting not only North Carolina, but all states stretching from South Carolina to New Jersey *even under the proposed interim settlement agreement with its 50-50 allocation arrangement.*

It is apparent from the responses that the present pro-rata plan has been equitable and fairly easy to implement in an effort to protect high-priority residential and commercial and other firm customers from curtailment, especially those wholly dependent on Transco. It is also equally evident that an Order No. 467-B curtailment would not be regarded as a Heaven-sent panacea. As a matter of fact, it probably would be bitterly opposed as being utterly disruptive. In view of this implication, I regard the 50-50 settlement proposal as a remarkable compromise which should be accepted as being in the public interest.

The potential impact of a 467-B plan, I conclude, probably formed the foundation for the compensation features in that end-use results in disproportionate curtailment among distributors with some having to absorb the economic losses attendant to loss of gas supply. It is a means to allocate the financial burden in the same manner curtailment allocates supply. Compensation payments are intended to further balance the equities, and is consistent with the principle of the 25-cent debit-credit surcharge accepted as Article IV, of the "order Approving Interim Settlement Agreement," issued November 15, 1972, and

still in effect. Virtually, all of Transco's customers, including those who will pay compensation, either support, or do not oppose, the payments provision as an essential ingredient of the compromise.

It would be premature to try to assess the full impact of Transco's deepened supply curtailments on the emergency relief moratorium provision, which makes a powerful contribution to the urgent need for stability and orderly management among all customers over the entire Transco system. While I regard the settlement as a good faith agreement requiring good faith compliance, I must concede the possibility that the moratorium provision may now be meaningless. If this assumption is correct, then it will be up to the Commission to view all petitions for emergency relief with more strictness than heretofore demonstrated.

In any event, the interim settlement agreement should be approved, pending prescription of a permanent curtailment plan for Transco. There is enough caution in the record before us to compel a searching look before imposing a flat 467-B program.

It appears that Transco is the victim of this Commission's inability to recognize a formula which can temporarily reallocate an inadequate supply of gas among customers with varying degrees of need equitably and without injury to individual rights of supply.

I am mindful that this is the 11th of November 1974 and that the history of this proceeding is long and tenuous. I am fearful of the consequences of con-

tinued litigation and I am aware of this Commission's demonstrated and legally frustrated inability to direct or encourage a harmonious agreement among Transco and its customers. This, in my opinion, is not the time for this Commission to say that it can't permit Transco either to continue its former interim settlement plan or to adopt its new settlement plan because both are illegal. We have been ordered by the Court of Appeals to do one or the other and it makes infinitely more sense to me to accede to the Court's alternative and accept at this time the new settlement agreement which is based on much more current data than the 3-year-old interim plan my colleagues would, in effect, have Transco resort to.

I am compelled to dissent to the decision reached by my colleagues. Unlike the reasons alleged for their decision I do not find that the opinion which they have reached is unlawful or discriminatory, but it is untimely, inappropriate and out of season.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Docket Nos. RP72-99; RP75-16-1; RP75-17-1; RP75-16-3; RP75-16-4; RP75-16-5

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(Eastern Shore Natural Gas Company)

EASTERN SHORE NATURAL GAS COMPANY
(Stauffer Chemical Company)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(South Jersey Gas Company)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(Union Gas Company—New Jersey Zinc)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(City of Linden, Alabama, *et al.*)

ORDER

GRANTING REHEARING IN PART, DENYING REHEARING IN PART, AND REQUIRING ENVIRONMENTAL IMPACT STATEMENT

(Issued January 10, 1975)

We grant rehearing in part of our order of November 12, 1974, in Docket No. RP72-99.

As a result of a recent order of the Court of Appeals for the District of Columbia Circuit, the settlement agreement filed with us in that docket on September 30, 1974, by the Transcontinental Gas Pipe Line Corporation is now in effect, providing an interim curtailment plan for Transco based essentially on 50% pro rata curtailment and 50% end use considerations. The compensation plan that is part of the settlement agreement, and about which we have expressed our misgivings, is also in effect, to the extent that the payments required pursuant to it are to be paid into an escrow account pending determination of the legality of the procedure. We shall speak further to these matters below, but will first place the rehearing applications now before us in context.

Background:

Our recital of the background of this proceeding can, for current purposes, commence with our order of November 12, 1974. The history of the case prior to that date is adequately summarized in that order. On November 12 a majority of the Commission concluded that an emergency exists on the Transco system, with a foreseen 20% curtailment of firm requirements during the 1974-75 winter season, and 28% on an annual basis; that such curtailment levels threaten Transco's customers with irreparable harm; that the then-effective interim curtailment plan, being based on pro rata contract curtailment, is contrary to

the public interest; and that Transco's settlement proposal of Sepember 30, based on 50% pro rata contract curtailment and 50% end use curtailment, is unlawful and should be rejected. We further stated that the compensation scheme that is a part of the settlement plan is unlawful because it would depart from cost-based rates, it would foster undue discrimination, it would circumvent section 4(d) of the Natural Gas Act, and it would involve potential violations of section 7(c). Finally, we expressed our continuing preference for the end use curtailment plan filed by Transco on June 29, 1973, the effectiveness of which was stayed by the Court of Appeals.

Following our November 12 order,

—Transco, on November 13 tendered for filing with us an interim curtailment plan that parallels in almost all particulars the plan it had filed on June 25, 1973. It, too, is based on end-use priorities. We gave notice of the Transco action the following day, and we invited comments on it. In the next several days we received comments or protests from approximately two dozen sources, most of which urged rejection of this latest plan.

—Eighteen applications for rehearing of our November 12 order were filed between November 13 and December 12.[1] Some of these applications under-

[1] Applications for rehearing of the November 12, 1974, order were filed by the General Motors Corporation and the Brick Institute of America, on November 13, 1974; the Consolidated Edison Company of New York, Inc., the Owens-Corning Fiberglass Corporation, and the Transcontinental

took to rebut the reasoning that led to our conclusion that the compensation plan is unlawful; several presented arguments as to the undesirability of an interim plan based essentially on end-use priorities; and almost all contended, in effect, that we should have accepted the Transco settlement plan of September 30, 1974.

—The Court of Appeals for the District of Columbia, on November 26, in *Consolidated Edision* v. *F.P.C.*, No. 73-1999, issued a further opinion concerning an interim curtailment plan for Transco. Following the filing of various motions by the petitioner, certain intervenors, and this Commission, the court in its opinion concluded that the then-effective pro rata curtailment plan should not be continued in

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Gas Pipe Line Corporation, on November 15, 1974; the City of Danville, Virginia, the City of New York, the Clinton Newberry Natural Gas Authority, the Elizabethtown Gas Company, the Long Island Lighting Company, the Piedmont Natural Gas Company, Inc., the Public Service Commission of the State of New York, and the Public Service Electric and Gas Company, on November 19, 1974; the Virginia Pipe Line Company on November 21, 1974; the Consolidated Gas Supply Corporation on November 25, 1974; and the Atlanta Gas Light Company on November 27, 1974. Our order of December 13, 1974, granted rehearing of the foregoing applications for purposes of further consideration. Applications for rehearing were filed on December 12, 1974, by the South Carolina Public Service Commission, the South Jersey Gas Company and the Eastern Shore Natural Gas Company, and the State of North Carolina and the North Carolina Utilities Commission. Our order of December 31, 1974, granted rehearing for purposes of further consideration to these December filings.

effect and that the end use plan, filed in June of 1973 and again on November 13 of this year, was also inadequate and unacceptable. The court placed in effect "the allocation scheme contained in the September 30, 1974, settlement agreement", pending further order of the court. As to the compensation scheme, the court accepted the suggestion advanced by several parties that "the FPC's objections could be met by placing funds in an escrow account pending a determination of the procedure's legality". The court also stated that

> Our present action in placing into operation the allocation plan contained in the settlement agreement in no way precludes the Commission from modifying the settlement plan or taking other action based on the information which it has generated and is peculiarly in a position to sift and evaluate.

And further, the court stated that the record compiled in this proceeding

> provides a valid basis on which the Commission, under the conditions which now confront Transco's customers, could issue interim orders effectuating a plan which does not comport with the one submitted by the pipeline.

But the court made clear that it would maintain continuing surveillance, and that any action by us would be effective only upon the court's approval.

From the foregoing quoted language, we understand that there has been restored to this Commission the authority vested in us by the Natural Gas Act,

particularly our curtailment authority contained in sections 4 and 5, so that we may prescribe an interim curtailment plan for Transco or modify the settlement plan now in effect—subject, of course, to such constraints as appear elsewhere in the court's opinion.

The Compensation Scheme:

We turn first to a further discussion of the compensation scheme. We remain of the view, expressed in our order of November 12, 1974, that it is unlawful.

The interim curtailment plan now in effect pursuant to the order of the Court of Appeals provides that those customers of Transco who are curtailed most heavily will receive compensation, and that such compensation will be paid by the Transco customers who are less heavily curtailed. More particularly, any Transco customer who is, under the settlement allocation plan, curtailed less than the system average, would pay a surcharge of 50 cents per Mcf for the gas he receives in excess of the system average. A customer who is curtailed more than the system average would, on the other hand, have credited to his bill 50 cents per Mcf for the gas he does not receive, up to the system average. Similarly, and in addition, a further 25 cents per Mcf surcharge is applied with respect to a customer who receives more gas than he would be entitled to under a curtailment plan based precisely on 50% pro rata contract curtailment and 50% end use curtailment under our Order No. 467-B. And, by the same token, a further 25 cents

credit would be allowed in connection with those receiving less than they would be entitled to receive under a 50-50 plan. Accordingly, a Transco customer with a high priority load could pay, in addition to the base rate, a 75 cents per Mcf surcharge for some of the gas he receives from Transco, and other Transco customers who are more heavily curtailed would be credited at the rate of 75 per Mcf for gas forgone. Transco would act in effect as the transfer agent.

We recognize that this Transco compensation scheme is designed to respond to the phenomenon of heavy curtailments by providing a kind of rough justice. Those customers most heavily curtailed would receive compensatory payments that would, to varying extents, reduce their burdens. But the justice that would thereby be provided is, we think, too rough. It is too rough to pass muster under the Natural Gas Act, and it is too rough for us to view as equitable.

Our November 12 order provides four bases for our conclusion that the Natural Gas Act does not permit this compensation scheme. Many parties dispute our conclusion and our reasoning—almost all of those who have filed applications for rehearing do so, and in addition, the legal question is discussed in many of the initial briefs and reply briefs filed on November 1 and November 25, respectively, in connection with a permanent curtailment plan for Transco. We thus have before us extensive arguments by the parties on the lawfulness of this kind of compensation

scheme. Some of the parties support our November 12 views on this subject; a greater number do not.

We said on November 12 that the compensation scheme is unlawful because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return" (p. 13). We continue to think so. Many parties point out that we have often departed from the view that rates must be strictly cost-based, as, for example, in connection with our optional procedure for the establishment of producers' rates. But we are and have been unwilling to prescribe rates or customer classifications that are unrelated to cost, and that is what we would have to do if we were to approve the Transco compensation scheme. The affidavit of Transco's Vice-President that accompanied the filing of the interim settlement makes clear that the 50 cents and 25 cents payments do not derive from any effort to establish cost consequences. These figures were plucked from the air, and their sole support stems from the fact that the private parties to this proceeding were largely willing to embrace them. To discover such figures, supported by so many, is not an inconsiderable achievement, but the achievement is not one that is countenanced by the Natural Gas Act. We have very recently been reminded by the Court of Appeals for the District of Columbia that "it is doubtful that non-cost factors can sustain a decision by the FPC which is unsupported by sound cost data". *Consumers Union* v. *F.P.C., et al.*, No. 73-1972 *et al.*, October 7,

1974. There is no allegation by any party that the compensation here involved is based on any cost data, or on any support whatsoever as to price level. In its absence, we cannot approve the plan.

In a further argument concerning this point, the South Jersey Gas Company and the Eastern Shore Natural Gas Company contend that we should not be troubled by the absence of cost support here, because we have approved penalties for overruns "without any mathematical calculation as to their impact" (Initial Brief, p. 15). But we think the analogy is a false one. We have indeed approved rather stiff penalties for unauthorized overruns (*United Gas Pipeline Company*, Opinion No. 671, issued October 31, 1973; *El Paso Natural Gas Company*, Opinion No. 697, issued June 14, 1974), but we were in such cases dealing with just that: *penalties* for *unauthorized* overruns. In Transco's case, on the other hand, the additional charges are not intended to constitute penalties or deterrents (although we think they would have that effect), and they would apply to gas that the customer is fully authorized to take.

Our November 12 order also concluded that the compensation scheme is objectionable because it would foster undue discrimination. We illustrated this conclusion with a hypothetical case showing that two companies, similarly situated except for their contract entitlements, would, with the compensation scheme in effect, pay widely disparate rates for the same quantity of gas. To the several parties who argue that the case is oversimplified, we would point

to the non-hypothetical case outlined in Philadelphia Gas Works' initial brief:

> . . . under the settlement proposal, PGW [Philadelphia Gas Works] in effect would be paying a *premium* of over 6 cents per Mcf for all Transco CD gas it received during the coming winter period, while Piedmont Natural Gas Company would receive a *discount* of over 7 cents per Mcf for all such gas it received during this period. The latter case would result from Piedmont's receipt of 50 cents per Mcf compensation for the approximately 2,800,000 Mcf difference between the volume it would receive under a pro-rata curtailment . . . and the volumes it would receive under the settlement. In addition, Piedmont would receive 75 cents per Mcf for the some 200,000 Mcf less gas it would receive under the settlement than under the 50% pro-rata—50% Order No. 467-B figures. The resulting payment of some $1,500,000 to Piedmont, applied to Piedmont's settlement entitlement of 20,140,000 Mcf, would reduce the rate, for Transco's deliveries to Piedmont, by over 7 cents per Mcf. In contrast, PGW would be forced to pay 50 cents per Mcf for the approximately 1,300,000 Mcf difference between pro-rata curtailment volumes and the 50% pro-rata—50% Order No. 467-B levels. In addition, PGW would be compelled to pay 75 cents per Mcf for the some 800,000 Mcf difference between the 50% pro-rata—50% Order No. 467-B level and the settlement level. The resulting $1,250,000 compensation liability, applied to PGW's settlement entitlement of approximately 20,000,000 Mcf, would increase PGW's cost of gas from Transco by over 6 cents per Mcf. Adjusting for zone differentials, Transco's rates would vary by 13 cents per Mcf for gas served to PGW and to Piedmont during the winter season. (p. 18)

To those who argue that the compensation scheme would work to eliminate discrimination, rather than to create it—on the ground that the consumer customers of one distributor ought not to pay rates that differ substantially from those paid by the same kind of consumer customers of another distributor, and compensation payments would tend to have an equalizing effect on their rates—our answer is two-fold. First, we are not empowered to fix rates for sales not subject to our jurisdiction, and such rates already differ greatly, depending upon a multitude of economic factors plus the varying views of State commissions. Additionally, the payments, unrelated to costs, losses, or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to be helpful to another, without visible regard to the question of how much helpfulness is actually needed. Indeed, the justice would be too rought.

Thirdly, we stated that the compensation scheme would circumvent section 4(d) of the Natural Gas Act, which bars rate changes in the absence of notice to the Commission and to the public. We now abandon this objection, to the extent that we earlier applied it to Transco itself. If the compensatory payments are suitably reflected in Transco's tariff filings, as we can presume (and we grant rehearing

below with respect to our earlier rejection of Transco's tariff sheets), then this objection seems to us no longer well taken. That is to say, if Transco's filed tariffs were to comply with the requirements of Section 154.63 of our Regulations and display fully the circumstances in which the additional 50¢ and 25¢ charges were to apply, then the requirements of section 4(d) and the Regulations thereunder would be met by Transco. Transco would not be required to refile each time such additional charges are to be collected, or abandoned. We are prepared to analogize the rate changes automatically arising from compensation payments and credits to those automatically arising from, for example, fuel adjustment clauses. We accept the latter, and if otherwise unobjectionable, we would also accept the former, if set forth in the pipeline's tariff.

But we remain of the view that the compensation scheme would involve circumvention of section 4 by Transco's customers. As we shall explain below, we think those customers who participate in the compensation scheme, under which some forgo gas and others acquire additional supplies in return for compensatory credits and payments, are engaging in sales subject to our jurisdiction. Natural gas companies that make jurisdictional sales must file their rates with us under section 4(a) of the Natural Gas Act, and they must file changes under section 4(d). In the absence of suitable rate filings by those Transco customers who make such jurisdictional sales pur-

suant to the compensation plan, such customers would engage in violations of section 4.

Finally, we objected to the compensation plan because, without more, it would involve the violation of section 7(c) of the Natural Gas Act. We stated:

> In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce . . . Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act . . . (p. 14)

We are now on uncharted ground and dogmatism is inappropriate, but we cannot escape the conclusion that the many parties here involved have, as a matter of law, arranged for future sales. The parties before us, and they are both numerous and just short of unanimous, negotiated and agreed to the settlement terms; they urged us to approve the settlement; they supported it before the Court of Appeals; and they now argue to us in favor of our acceptance of the compensation portion of it. Some of these parties have agreed to forgo gas so that others may have it —in return for compensation, or consideration, flowing to the former from the latter. The elements of a sale are present. Some tell us that no sales are involved because the transfers and compensation payments are involuntary, but we find this contention difficult to accept, because those who tell us so voluntarily support the settlement plan in all its aspects.

They have agreed to the deprivations, and the augmentations, under the settlement terms. We think, thus, that sales are involved.

We conclude that the compensation plan is unacceptable as a matter of law. We also conclude that it is unacceptable as a matter of policy because of its inherent inequity. It punishes customers with high priority loads, for they would pay more for gas to meet those loads; it provides credits to those with lower priority loads, without regard to whether their costs or losses are correlated in any way with the payments to be received. The scheme is, in our view, patently unfair to Transco's customers and to their customers, and we are unwilling to approve it.

Finally, we find that compensation schemes such as the one herein proposed are not consistent with the public interest. A compensation scheme that is tied to the full cost of alternate fuels rather than fifty cents per Mcf could not be distinguished in principle from the plan here at issue. In either case, the price that the high priority natural gas consumer would be required to pay moves closer to a "commodity" level with each increase in curtailment. Also, the "compensation" that is received by the curtailed customers would cause upward pressure on alternate fuel prices. The beneficiaries of the added cost and upward pressure would be the producers of oil and other fuels and not the producers of natural gas. Such a system would exacerbate the existing distortion in the relative incentives for exploration for oil and for natural gas and, consequently, de-

press natural gas exploration at a time when national policy should encourage maximization of that exploration. If the ultimate consumer is to be required to pay a price for natural gas that moves toward the commodity level, sound policy and common sense dictate that the rewards flowing from that price be bestowed for the production of natural gas and not for the production of alternate fuels through "compensation" schemes such as that herein proposed.

Inasmuch as our position on the compensation scheme is explicitly subject to review by the Court of Appeals, and thus notwithstanding our views as to its unlawfulness, the compensation scheme shall remain in effect as provided by the Court of Appeals, pending its further order.

The Allocation Scheme

Since the compensation scheme is unlawful, the settlement must be rejected *in toto*, without regard to the propriety of the allocation scheme.[2] Article X of the settlement provides:

> This agreement is made pursuant to Section 1.18(e) of the Commission's Rules of Practice and Procedure and, if it is not accepted in its

[2] Of course, Transco is free to submit a new setlement, without the unlawful compensation feature, in which case we would accord a full review on the merits consistent with our responsibility under *Michigan Consolidated Gas Company* v. *FPC*, 283 F.2d 204 (D.C. Cir.), *cert. denied* 364 U.S. 913 (1960).

entirety without condition, it shall be privileged and of no effect.

Thus, the currently effective allocation scheme shall continue in effect pursuant to the court's order, pending any future action by this Commission. In this regard, we are not prepared to say that the currently effective interim plan is sufficient to protect Transco's customers for even the remainder of the current winter heating season. Transco's supply situation continues to worsen, as indicated by the growing number of petitions for extraordinary relief,[3] and it may be necessary for the Commission to either modify the present interim plan or prescribe a new plan pursuant to our authority under section 5(a) of the Act.[4] Any further modification, however, will be made only if it is determined that the harm created by the currently effective plan is greater than the harm that would be inherent in a switch at mid-winter to a new plan.

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[3] We are consolidating for hearing the petitions for extraordinary relief from Transco's currently effective curtailment plan that have been filed in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-4, No. RP75-16-5, No. RP-75-16-6, No. RP75-16-7 and No. RP75-16-8. The consolidation of these petitions for hearing and decision will facilitate our assesment of the effect upon Transco's other customers that would arise if such petitions were granted.

[4] The State of North Carolina and its Utilities Commission filed with us on January 7, 1975, a document entitled "Petition of State of North Carolina and North Carolina Utilities Commission for Investigation of Transco's Supply Situation, for Extraordinary Relief from Curtailment, and for Immediate Relief Pendente Lite". We construe this filing as constituting a complaint under section 5(a) of the Natural Gas Act, and we shall give further attention to it by separate order at an early date.

The Staff Motion to Dismiss:

We shall also at this time deal with one further, recent development. On November 29, 1974, the Staff filed a motion asking us to dismiss six petitions for extraordinary relief that had been filed by certain of Transco's customers (in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-2, No. RP75-16-3, No. RP75-16-4, and No. RP75-16-5). The Staff argues that the settlement plan was represented to the Court of Appeals and accepted by it as one that would avoid irreparable harm; that the settlement agreement itself bars petitions for extraordinary relief in the absence of changed circumstances; and that the petitioners, in order to qualify for relief, must thus demonstrate a change in circumstances arising after November 21, 1974, on which date oral argument was heard by the Court of Appeals.

One of the foregoing petitions, that filed in Docket No. RP75-16-2, has been withdrawn. We approved the withdrawal in our order issued on December 19, 1974, but the petitioners therein have since renewed their request in a new docket, No. RP75-16-8. The petitioner in Docket No. RP75-16-3 filed for withdrawal on January 7. The remaining petitions have been the subject of recent orders, but all such petitions remain before us, either through applications for rehearing or through further requests for our

action. We shall, therefore, deal with the Staff motion of November 29 with respect to the dockets involved, without thereby intending to affect any of them in any manner except in connection with the Staff motion.

As to these cases, we think that the Staff motion offers an appealing logic, but we fear that we would be working an injustice if we were to treat of these cases collectively. The parties to these cases stand on different footings. While the representations made by any of them to the Court of Appeals will certainly be relevant to our subsequent determination of their needs, those representations are not parallel. For example, among the petitioners here involved, at least two were not parties to the proceeding then before the Court of Appeals (the Stauffer Chemical Company and the Eastern Shore Natural Gas Company), and at least one other (the South Jersey Gas Company) says that it expressly advised the court that notwithstanding implementation of the settlement plan, it would still require extraordinary relief. In the circumstances, it will be necessary for us to deal with these cases, and the representations made by the parties to them, on a case-by-case basis, when the proceedings are completed and the cases reach us for decision.

In addition, we are disinclined to read the Court of Appeals' decision of November 26 as barring petitions for extraordinary relief filed earlier. While the court did observe that

> Opponents of both the present [pro rata] plan and the 467 plan agree that the settlement will avoid irreparable harm (p. 20),

the court concluded its opinion by stating that

> Our order is not intended to restrict in any way the Commission's powers to respond to petitions for emergency or extraordinary relief from the curtailment plan placed in effect by this opinion (p. 24)

Accordingly, we will not ourselves restrict our powers to respond to the petitions now in question, and we will deny the Staff motion.

Compliance with NEPA:

In the meantime, proceedings concerning a permanent curtailment plan for Transco move forward. The extensive record has been closed, and as noted, initial and reply briefs have been filed. Once again, however, we have before us the question of compliance with the National Environmental Policy Act. The Presiding Administrative Law Judge on November 15 certified to us the following question:

> In view of the actions of the Courts of Appeals for the Fifth and District of Columbia Circuits in *Louisiana* v. *FPC* and *Consolidated Edison* v. *FPC*, respectively, should the staff of the Commission be required to prepare an environmental impact statement?

In *State of Louisiana* v. *F.P.C.*, No. 73-3478, the Court of Appeals for the Fifth Circuit on November

8, 1974, held that environmental impact statements are required in connection with permanent curtailment plans. Although the Court of Appeals for the District of Columbia has not announced a final decision on this point in the Consolidated Edison case, we are mindful of the views of the court recently expressed in *American Smelting and Refining Company* v. *F.P.C.*, 494 F.2d 925 (D.C. Cir., 1974). Accordingly, this proceeding must be reopened so that compliance with the requirements of the National Environmental Policy Act can be achieved.

This action will necessarily delay for some months our decision on a permanent curtailment plan. We would admonish the parties to proceed with reasonable dispatch, so that we can act on a permanent plan at least before the 1975-76 heating season commences. In connection with the preparation of an environmental impact statement by the Staff, we would of course expect Transco and other parties to this proceeding to cooperate by responding to data requests from the Staff. We would also call to the attention of the parties certain of the caveats offered by the Fifth Circuit: "We do not intend the impact statement requirements to be a weapon for disappointed parties"; the NEPA obligation "is imposed subject to a rule of reason"; this Commission "should not pour an inordinate amount of its resources into environmental forecasting"; but we must "make a good faith effort to comply". That we will surely do. Our Staff will be required to prepare an environ-

mental impact statement consistent with the court's opinion.

North Carolina Application for Rehearing:

Finally, the State of North Carolina and the North Carolina Utilities Commission applied for rehearing on December 2 in connection with our letter-order in this case of October 31. In that order we rejected the tariff sheets, intended to implement the September 30 settlement plan, that had been tendered by Transco on October 11. It is appropriate that rehearing be granted, but because Transco on November 27, 1974, again filed tariff sheets that implemented the settlement plan, which sheets we accepted in our order of December 31, 1974, no further action is required of us on this matter at this time.

The Commission finds:

(1) In light of the opinion of the Court of Appeals of the District of Columbia in *Consolidated Edison* v. *F.P.C.*, the settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, is now in effect, as of November 16, 1974. Payments made pursuant to the compensation plan will be handled as ordered by the court.

(2) The interim curtailment plan filed by Transco on November 13, 1974, should be rejected.

(3) The motion filed by the Staff Counsel on November 29, 1974, in Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5, should be denied.

(4) The issue of a permanent curtailment plan for Transco should be the subject of an environmental impact statement and, if any party desires cross-examination thereon, of reopened hearings before the Presiding Administrative Law Judge, so that the requirements of the National Environmental Policy Act, as construed in *State of Louisiana* v. *F.P.C.*, can be met.

(5) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, should be granted.

(6) The assignments of error and grounds for rehearing set forth in all other applications for rehearing filed in this proceeding, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, present no facts of legal principles that would warrant any change in or modification of the conclusion on such question contained in the order of November 12, 1974.

The Commission orders:

(A) The interim settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, shall be effective as of November 16, 1974, except that payments made pursuant to the compensation plan shall be handled as ordered by the court, pending further order of the court.

(B) The interim curtailment plan filed by Transco on November 13, 1974, is rejected.

(C) The proceeding, insofar as it relates to a permanent curtailment plan for Transco, is reopened so that all steps necessary may be taken to insure compliance with the National Environmental Policy Act, as construed in *State of Louisiana* v. *F.P.C.* The Final Environmental Impact Statement prepared by the Staff shall be made a part of the record, and if any party desires to conduct cross-examination thereon, an opportunity will be afforded. In that event, a further public hearing with respect to the Final Environmental Impact Statement shall be held before the Presiding Administrative Law Judge in Washington, D.C., commencing on such date as he may, in his discretion prescribe.

(D) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, is granted, as provided above.

(E) The Staff Motion filed on November 29, 1974, with respect to Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5 is denied.

(F) The applications for rehearing of the order of November 12, 1974, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, are denied.

By the Commission. Commissioner Brooke, concurring and dissenting in part, filed a separate statement appended hereto.

[SEAL]

KENNETH F. PLUMB,
Secretary.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP72-99

(Issued January 10, 1975)

BROOKE, Commissioner, *concurring and dissenting in part*:

I concur in that portion of the order which assigns an effective date of November 16, 1974, to the interim settlement plan; rejects the interim curtailment plan filed on November 13, 1974; denies Commission Staff motions to dismiss various extraordinary relief cases; directs preparation of an environmental impact statement, and grants North Carolina's application for rehearing.

My dissent is limited solely to the determination that the compensation procedure agreed to in settlemetn is unacceptable both as a matter of law and of policy. The Commission now abandons the argument that the compensation plan would circumvent Section 4(d) of the Natural Gas Act as it applies to Transco, a conclusion with which I agree, but holds that the transfer or relinquishment of gas pursuant to the settlement plan would be a violation of both Sections 4 and 7(c) by Transco's customers, unless sales certificates were otherwise obtained and appropriate rate filings made, a conclusion with which I disagree.

My opinion as to the lawfulness or appropriateness of such compensation features is set forth in my dissent to the order denying the interim settlement pro-

posal (*Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99, order issued November 12, 1974).

There is no dispute as to the facts, but the Commission followed a strange path in reaching its legal conclusion. Rather than affording the parties opportunity to brief the legal question of compensation prior to making a determination, the Commission abruptly surfaced its objections to the compensation procedure in its November 12 order. It now, in effect, regards the "extensive arguments by the parties" (Page 6, *supra*) as briefs on the legal issue and proceeds to reaffirm its prejudgment.

The interim settlement agreement represented a significant accomplishment among numerous Transco customers with diverse loads to allocate a dwindling pipeline gas supply on a split pro-rata, end-use schedule to protect essential and necessary loads. It was absolutely clear among all participants that some customers would be called on to surrender gas to other customers—and that the compensation plan for gas not received was simply an adjustment or offset to any economic dislocation occasioned by the allocation of volumes to protect high priority consumers. The Commission's strict adherence to cost-based rates is misplaced because the courts have bestowed considerable discretion upon the Commission in prescribing rates, dating back to the *Hope* case (*FPC* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944)) with its end result prescription, down to the *Moss* case (*John E. Moss et al* v. *Federal Power Commis-*

sion, No. 72-1837 *et al*, D.C. Circuit decided August 15, 1974), which held that market prices while not determinative, could be considered in setting just and reasonable rates.

The Commission's sudden concern over cost-based rates and the need for Sections 4 and 7 filings in emergency cases is rather curious. Certainly, it had no difficulty in formulating Section 2.68, Rules of Practice and Procedure, which provides that exempt entities (distributors and intrastate pipelines) can make temporary 60-day emergency sales and deliveries in interstate commerce "without any express authorization by the Federal Power Commission." The emergency nature of these sales also prompted a Commission conclusion that the "transporter should, of course, receive adequate compensation for any additional transportation services rendered" pursuant to Section 2.68. It further provides that upon termination of the emergency, the pipeline "shall inform the Commission, in writing, of the total amount of compensation received, if any, and the means by which the per Mcf compensation was derived." Since the compensation procedure is analogous to Section 2.68, the Commission's concern that the higher rates paid for exempt gas "are unrelated to a pipeline's cost of service plus reasonable rate of return" (Page 6) is misplaced.

It overlooks the fact that the transaction is between non-jurisdictional entities, that the pipeline is only the middleman transporter, and that the Commission would have legal review of the pipeline

rates in an appropriate rate case. Section 2.68 also provides for extensions beyond 60 days. Exemption of temporary acts and operations is also extended under Section 157.22, Regulations Under the Natural Gas Act, which states that the "public interest does not require the issuance of a certificate for the . . . sale of natural gas necessary to assure maintenance of adequate natural gas service where interruption or serious curtailment of service exists or is threatened . . ." Within 10 days, the Commission is to be advised of, *inter alia*, the rate schedule, contract or service agreement covering the sale involved. Similarly, Section 157.29 speaks of emergency 60-day sales by an independent producer without a Commission-issued certificate. Both, Sections 157.22 and 157.29 contemplate the possibility of such 60-day emergency sales' becoming of longer duration. These three emergency programs, sanctioned by the Commission and never appealed to the courts, stand as ample justification for the type of compensation program proposed by Transco and its customers. They have been of critical importance in attracting badly needed increments of new gas to the interstate market, and similar programs to allocate gas, rather than attract new gas, should not be rejected out of hand.

I agree that the justice of the compensation plan most likely will be rough (Page 8, *supra*), but it is difficult to determine who will be "roughed up" the most. Certainly those high-priority customers called on to pay higher prices will feel the pinch, and as-

suredly those lower priority users who relinquish gas may find the surcharge only of moderate benefit to offset loss of gas supply—but all parties, save one, agreed that such drastic steps were required to cushion gas and revenue loss at one end with gas gains and higher prices at the other. It is still significant that the settlement is strongly supported by many Transco customers who would be in far better shape under a straight 467-B end-use plan.

I cannot agree that Transco's compensation plan would punish high priority customers because they would pay more for receipt of additional gas and be unfair to those low priority users surrendering gas where little correlation exists between costs and losses with credits received. Nor can I agree that the surcharge plan is inconsistent with the public interest. The order states (Page 10) that the higher price occasioned by each increase in curtailment moves the market price closer to the "commodity" level.

I hope that my Colleagues are not overlooking the fact that one of the legacies of wellhead regulation of natural gas prices has been the creation of distorted patterns of fuels consumption in the United States—that regulated low rates aided and abetted grossly inefficient uses, discouraged development of the gas resource potential, dispersed drilling technology to the foreign areas, and, as we are now experiencing, inherited the declining productivity of old wells, curtailments and higher consumer prices.

The massive natural gas reserves existing a quarter of a century ago were moved into the interstate

system with little regard to their ultimate impact on the nation's basic energy sources of coal and oil. Rates were designed to supplant coal and oil in their traditional markets, and the efficiencies of high load factors were promoted to provide cheaper gas to the high-priority residential and commercial customers, even if it meant dumping off-peak gas under boilers at dime store rates to keep the lines full. Little thought was given to pricing gas on a value basis or whether it was the best fuel for the job, but I will not fault the past through hindsight. The critical energy crunch dictates that we conserve and make better use of our resources—gas, oil and coal—on the one hand while striving to develop our total resource base on the other.

It is probably true that those curtailed customers will exert pressure on alternate fuels, but I do not necessarily regard this as an evil. Price can be a very useful device in achieving a better allocation of fuel resources. It is very likely that we would have attained a far better pattern of energy consumption in this country had natural gas been permitted to establish a more realistic price, in relation to other fuels, through market forces. It is also very likely that consumer prices would be higher, whether or not a "commodity" rate, but this rate impact would have been accomplished gradually over a long period of time with a commensurate guarantee of more reliable supplies.

The search for gas is basically a search for hydrocarbons, with the search, if successful, yielding ei-

ther gas or oil or both. I do not see it likely that natural gas exploration will be depressed as the result of a Transco-type compensation plan, although I will not quibble with the Commission's view that such is a possibility. The Commission's Bureau of Natural Gas issued on January 2, 1975, a staff report which concluded that "from here on we must make do with less gas in absolute terms"—that it is no longer a question of supply playing catch-up with requirements. Making do with less gas is precisely what the settlement parties agreed to with the compensation feature serving to balance the equities.

The Commission has frequently commented on the desirable influence of marketplace competition and other market factors in determining appropriate natural gas rate levels. Now, it appears that one of the most important market factors, that of "commodity" pricing in relation to competitive fuels, is herein surfaced by the Commission as part of its rationale to negate the compensation procedure. Assuming such a position in this case on "commodity" rates could well be regarded as Commission precedent to prohibit the factor's consideration in future rate determinations.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Feb. 6, 1976, United States Court of Appeals for the District of Columbia Circuit, Robert A. Bonner, Clerk]

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC.
FARMERS CHEMICAL ASSO., INC.
GAS SECTION
GEORGIA MUNICIPAL ASSO.
MANUFACTURES INSTITUTE, INC.
STAUFFER CHEMICAL CO.
OWENS-CORNING FIBERGLAS CORP.
PUBLIC SERVICE CO. OF NORTH CAROLINA
THE BROOKLYN UNION GAS CO.
LONG ISLAND LIGHTING CO.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
PHILADELPHIA GAS WORKS
ALUMINUM CO. OF AMERICA
SOUTH JERSEY GAS CO.
ATLANTA GAS LIGHT CO.
PUBLIC SERVICE ELECTRIC AND GAS CO.
INTERVENORS

No. 75-1038

PIEDMONT NATURAL GAS COMPANY, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
AMERICAN TEXTILE MANUFACTURES INSTITUTE, INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
EASTERN SHORE GAS CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
ALUMINUM CO. OF AMERICA
PUBLIC SERVICE COMMISSION FOR THE
STATE OF NEW YORK
NORTH CAROLINA NATURAL GAS CO.
FARMERS CHEMICAL ASSO. INC.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1045

ELIZABETHTOWN GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
PIEDMONT NATURAL GAS CO. INC.
THE AMERICAN TEXTILE MANUFACTURING
INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC AND GAS CO.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA INC.
EASTERN SHORE GAS CO.
BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO. INC.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
NORTH CAROLINA GAS CORP.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1077

CONSOLIDATED GAS SUPPLY CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE
PIEDMONT NATURAL GAS CO.
AMERICAN TEXTILE MANUFACTURES INSTITUTE
OWENS-CORNING FIBERGLAS CORP.
SOUTH JERSEY GAS CO.
CONSOLIDATED EDISON CO., OF NEW YORK
GENERAL MOTORS CORP.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC & GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA
EASTERN SHORE NATURAL GAS CO.
THE BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
LONG ISLAND LIGHT CO.
INTERVENORS

No. 75-1099

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO. INC.
NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO. INC.
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
INTERVENORS

No. 75-1103

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO., INC.
LONG ISLAND LIGHTING CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
EASTERN SHORE NATURAL GAS CO.
SOUTH JERSEY GAS CO.
INTERVENORS

No. 75-1200

STATE OF NORTH CAROLINA AND NORTH CAROLINA
UTILITIES COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS COMPANY, INC.
FARMERS CHEMICAL ASSOC. CO.
EASTERN SHORE NATURAL GAS CO.
PHILADELPHIA GAS WORKS
SOUTH JERSEY GAS CO.
GENERAL MOTORS CORP.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE ELECTRIC AND GAS CORP.
CAROLINA PIPELINE COMPANY
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
OWENS-CORNING FIBERGLAS CORP.

Before: Bazelon, Chief Judge, * Edwards, United States Circuit Judge for the Sixth Circuit; and MacKinnon, Circuit Judge

ORDER

On consideration of the *per curiam* opinion of the Supreme Court of the United States granting the

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* Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

petition for certiorari, vacating the order of this Court, and remanding the case to this Court for further proceedings consistent with the Supreme Court's opinion, it is

ORDERED by the Court that the above cases are remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of the Supreme Court of the United States and the attached decision by this Court.

Per Curiam

Circuit Judge MacKinnon dissents for the reasons set forth in his attached statement.

PER CURIAM. On August 1, 1975, this court issued the following order in the above-styled case:

> On receipt and consideration of the briefs and record in the above-styled case; and upon consideration of the replies of the parties to this court's order of May 28, 1975, and to the order to show cause of this court entered on June 17, 1975;
>
> Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a servere curtailment of supply with consequent economic and financial hardship to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;
>
> Now, therefore, this court will hold in abeyance any decision upon the order of the Federal

> Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;
>
> And further, recognizing that time is of the essence, and for the reasons stated in the attached memorandum opinion, that said investigations and report to this Court be made within 30 days from the effective date of this order.

Thereafter the Commission petitioned The Supreme Court of the United States for a writ of certiorari. Subsequently, on January 19, 1976, the Supreme Court handed down a *per curiam* opinion granting the petition for certiorari, vacating the order of this court, and remanding the case to this court for further proceedings consistent with the Supreme Court's opinion.

The Supreme Court held that this court's order, to the extent that it prescribed for the agency "the methods, procedures, and time dimension of the needed inquiry and order[ed] the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency[,]" invaded the administrative domain.

The Court also, however, held:

> *Second.* We agree with the Court of Appeals that the existence of actual shortage of gas supplies forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1(b) of the Act, 15 U.S.C. 717b, to approve the curtailment of gas already contracted for. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Certainly that Court could properly conclude that the Commission would have abused its discretion had it approved curtailment plans in the absence of evidence whereby it "could have reasonably believed" the shortage to exist, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and that "substantial evidence" in the record is necessary to support any such finding by the Commission.

The Supreme Court also held:

> *Fourth.* We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that it was not, it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC* v. *Louisiana Power & Light Co.*, *supra.* Accordingly, the Court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Obedient to the views expressed by the Supreme Court, including its suggestion that "swift and priority consideration of this case" be given, we have considered whether or not on the partial record before us "the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to . . . decision" of the instant case. We conclude that it is, and hence this case is immediately remanded to the Commission for the required inquiry "in regard to the evidence of shortage."

We have noted with interest a case decided after the date of our preceding order and referred to in the Supreme Court's *per curiam* opinion without comment. *Mississippi Public Service Com'n* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975). In this case the Fifth Circuit held that contrary to the view expressed by the Federal Power Commission, the Commission did have jurisdiction "to effectuate relief of the type

sought in the petition for extraordinary relief." *Id.* at 1349. The relief sought in this Fifth Circuit case was a Federal Power Commission order to implement the same sort of proposal as is before us for high priority users who are scheduled to receive above average allotments of gas to compensate lower priority users who are allotted below average amounts of gas.

In our instant case, however, the Commission was presented with a negotiated agreement between higher priority users and lower priority users for the former to compensate the latter. This court has been urged by Transco and various of its distributing companies to find that the Commission's *disapproval* of this "voluntary agreement" is not supported by the record. We do not perceive how we could fairly consider "the lawfulness of the proposed compensation scheme" unless the Commission has first fulfilled its duty to determine whether a real shortage exists. Thus far the Commission has refused to certify the existence of the shortage claimed by Transco, and as far as our record shows, has not completed any investigation of its own.

While, of course, we are well aware that the Commission has disapproved this compensation scheme rather than approved it, we do not see how we can fairly weigh the legality of that decision unless the record contains a basis for our deciding whether or not the agreement was a truly voluntary response to an actual shortage. No such basis is provided absent the Commission's investigation of the shortage question and findings of fact on this issue which can be properly reviewed by this court.

For these reasons (to employ the words of the Supreme Court) we "immediately remand the case to the Commission for the required inquiry."

MacKINNON, *Circuit Judge*, dissenting: My views on this case were initially set forth in the memorandum accompanying the order of this court of August 1, 1975. We deal here with a *disapproval* by the Commission of a compensation scheme in a curtailment plan. If the Commission is affirmed by the court, then it is unnecessary to determine the existence or extent of a gas shortage because the compensation scheme is *invalid* on its face and it is not necessary to go further and determine the existence or extent of a gas shortage because such factual predicate is only necessary to a *valid* plan. It is true that if the record does not furnish the Commission with a basis for reasonably believing that a gas shortage exists or is imminent the Commission would not have authority to *approve* a curtailment plan but certainly the Commission can *disapprove* a compensation scheme in a curtailment plan submitted by the parties thereto when the scheme appears to be facially invalid and the existence of a shortage is not questioned by any party to the proceeding.

As to the substantive issue concerning the validity of the compensation scheme, it is my opinion that the Commission properly held the scheme to be an undue

discrimination prohibited by section 4(b) of the Natural Gas Act.

Under *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), curtailment plans are to be weighed against section 4(b) of the Natural Gas Act. This section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b). There is no question that the rates here are discriminatory; many natural gas rates are. The question is whether they are unduly discriminatory. Addressing this point, it is clear that under the settlement proposal Transco would charge different rates to similarly situated customers which rates were not the result of differences in Transco's cost of serving these customers. In actual operation, different rates would result from the varying degree to which each customer is curtailed and the degree of curtailment would be determined in part by the character of the use of the gas by the customer. Neither of these factors, degree of curtailment or nature of the use, is related to Transco's cost of service; but standing alone this is an insufficient ground upon

which to base a finding of illegality. The issue is whether the "difference in . . . charges, service . . . or in any other respect," based as it is on the non-pipeline costs specified in the settlement curtailment plan, is reasonable under the circumstances here present.

Under the proposed compensation scheme contained in the settlement curtailment plan it is obvious that high priority customers will be charged more for their gas and lower priority customers will pay less. Thus, the compensation plan would penalize high priority users for the benefit of low priority users, and in so doing would operate inconsistent with the approved objective of the Commission to base curtailment on end-use.[1] This inconsistency would result from the fact that the higher price required to be paid by high priority users would deter such priority customers from fully satisfying their needs and would thereby make the unused portion of their full entitlement to gas available for low priority users which in many instances is the more inefficient use. In any event it has been determined to be the lower *priority* use and favoring such low priority use, to the extent that the compensation scheme does, would frustrate and interfere with the operational scheme of the curtailment plan by interjecting factors that work against the principles upon which the plan is based.

---

[1] FPC v. Louisiana Power & Light Co., 406 U.S. 621, 641-647 (1972); American Smelting & Refining Co. v. FPC, 161 U.S.App.D.C. 6, 17, 494 F.2d 925, 936, *cert. denied sub nom.* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974).

Upon such reasoning the Commission acted properly within its authority in rejecting the proposed compensation scheme.[2]

It is also significant that the record does not support any showing of compelling need to discriminate in favor of the low priority users who would benefit from the compensation scheme. The Commission noted:

> [T]he payments unrelated to costs, losses, or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to [be] helpful to another, without visible regard to the question of how much helpfulness is actually needed. (R. 11689)

It is accordingly my view that the settlement agreement was properly rejected because the compensation scheme constituted an undue discrimination in that it would maintain unreasonable differences in "charges, service, facilities [and] in other respect[s] . . . as between . . . classes of service" contra to section 4(b).[3] I would thus affirm the decision of the Commission. I see no necessity for getting into matters that are not necessary to determine the *invalidity* of the plan. Finding the plan invalid on one ground is sufficient. If it were to be found invalid because of an insufficient shortage, the resulting invalidity would not be changed in any way. I thus see

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[2] FPC v. Louisiana Power & Light Co., *supra* note 1, 406 U.S. at 646-47.

[3] *Id.*

no necessity for a remand. I would rule on the principal issue.

I thus respectfully dissent from the finding in the foregoing opinion that "the evidence regarding Transco's actual shortage . . . is absolutely essential to . . . decision" of the instant case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

RESPONSE OF MISSISSIPPI RIVER TRANSMISSION CORPORATION IN SUPPORT OF GRANT OF A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION
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v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET. AL.,
Respondents.

RESPONSE OF MISSISSIPPI RIVER TRANSMISSION CORPORATION IN SUPPORT OF GRANT OF A WRIT OF CERTIORARI

Pursuant to Rule 21 of the Court, Respondent Mississippi River Transmission Corporation ("MRTC") hereby files its response in support of the petition for a writ of certiorari filed by the Federal Power Commission ("FPC") on May 19, 1976 and received by counsel for MRTC on May 20, 1976.

JURISDICTION, STATUTES INVOLVED, AND STATEMENT OF THE CASE

MRTC adopts the statements of Jurisdiction (Pet., p. 2), Statutes Involved (Pet., pp. 2-5), and Statement of the case (Pet., pp. 5-9) set forth in FPC's petition.

QUESTIONS PRESENTED

Whether, in connection with its approval of curtailment plans to be observed by pipeline companies, the FPC has the authority to impose a compensation scheme whereby higher-priority, jurisdictional resale customers would compensate lower-priority, non-jurisdictional direct sale customers for increased costs of alternate fuels used by such non-jurisdictional customers as the result of proportionately greater curtailment of natural gas deliveries to such non-jurisdictional customers.

REASONS FOR GRANTING THE WRIT

MRTC agrees with the FPC's assertion that the compensation issue presented by this case is of substantial importance in the administration of the Natural Gas Act. As noted in FPC's petition (p. 10), the question of compensation features in pipeline curtailment plans has arisen in numerous proceedings before the FPC and doubtless will continue to do so until the controversy regarding the scope and extent of FPC's jurisdiction with respect to such matters is settled by this Court.[1] Accordingly, MRTC submits that this Court should consider the issue ***now***, in this proceeding, in order to prevent needless administrative and judicial litigation involving the compensation issue on a piecemeal, case-by-case approach.

The facts of the instant case involve the comparatively narrow issue of whether or not it is beyond FPC's jurisdiction to impose a provision in a curtailment plan requiring

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[1]On page 10 of its petition, FPC lists various administrative proceedings which it states involve compensation schemes. Among those listed is the proceeding involving MRTC's curtailment plan. Although not directly involved in the instant case, MRTC submits that the feature of its curtailment plan to which the FPC refers is not a compensation provision beyond the scope of the FPC's jurisdiction because it does not involve the FPC in the determination of rates paid to or by non-jurisdictional direct sale customers.

jurisdictional customers to compensate ***non-jurisdictional*** customers for proportionally greater curtailments of gas deliveries to the latter. MRTC submits that such a provision would exceed the FPC's jurisdiction in that it would directly involve FPC in the establishment of effective rates or charges for non-jurisdictional sales, a power specifically denied it under the Natural Gas Act.

The Court below and the FPC (in its petition) dealt with the issue upon a much broader basis and phrased the issue in terms of whether or not ***all*** compensation plans are ***per se*** unlawful. In its petition (p. 7) FPC notes that, in its order denying rehearing in the instant case, it incorporated the analysis contained in two orders in an unrelated curtailment case.[2] That case primarily involved compensation payments between ***jurisdictional*** customers.

MRTC submits that compensation payments as between jurisdictional and non-jurisdictional customers should be held to be unlawful, but that compensation payments involving jurisdictional sales should not be ruled ***per se*** unlawful, but should be tested under the just and reasonable rate standards of the Natural Gas Act. MRTC further submits that without badly needed guidance from this Court with respect to the issue of permissible versus impermissible compensation features in curtailment plans of pipeline companies, the FPC, pipeline companies, and direct and indirect customers of such companies will be forced to continue in a morass of needless litigation.

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[2]*Transcontinental Gas Pipe Line Corp.*, Docket No. RP72-99. That case has been before this Court, but not on the merits, in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, No. 75-584.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MISSISSIPPI RIVER TRANSMISSION CORPORATION

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June 11, 1976

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IN THE

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v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

United Gas Pipe Line Company ("United"), an intervenor in the proceeding below before the United States Court of Appeals for the Fifth Circuit, herein files its brief in opposition to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission ("Commission").

OPINIONS BELOW AND JURISDICTION

The opinions below and the jurisdictional requisites are adequately set forth in the petition for a writ of certiorari ("petition").

QUESTIONS PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Commission is barred by Section 4(a) or 4(b) of the Natural Gas Act from consideration of any proposal whereby high-priority pipeline customers would compensate low-priority customers for some or all of the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries.

STATUTES INVOLVED

In addition to the statutes cited in the petition, Section 16 of the Natural Gas Act, 52 Stat. 821, *et seq.* is also relevant to this proceeding:

Section 16, 15 U.S.C. § 717o (1970):

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, appplications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective

> on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

STATEMENT

United adopts the statement of the case set out in the petition.

STATEMENT OF REASONS FOR DENYING THE WRIT

1. Contrary to the question presented in the petition, the court of appeals has not held that the Commission "... is *required* under the Natural Gas Act *to impose*" compensation arrangements such as that proposed by the Mississippi Public Service Commission.[1] Rather the court of appeals has held that the Commission, in exercising its authority to assure the implementation of just and reasonable curtailment plans, has jurisdiction *to consider* such compensation proposals and should exercise this jurisdiction.

The distinction is significant. Rather than mandating "... a general restructuring of pipeline rates for sales of natural gas ..." (petition, p. 10), the court of appeals has held that the Commission is not barred as a matter of law from attempting to allocate the economic burden of curtailment in as fair a manner as possible through full exercise of its curtailment authority. Every compensation proposal need not be

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[1] Petition, p. 2 (Emphasis added).

approved and many curtailment programs may be found to be just and reasonable without such a provision.

2. The Commission's curtailment authority as confirmed by the Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), clearly embraces the jurisdiction to consider compensation arrangements as part of a curtailment plan. The arguments in the petition, like the Commission's arguments to the court of appeals, essentially turn on the contention that consideration of compensation arrangements constitutes "rate-setting" and thus is subject to the Natural Gas Act's limitations upon the Commission's power to set rates. In *Louisiana Power & Light,* the Court disposed of essentially this same contention, holding that the Commission had authority to order curtailments to direct sales customers, notwithstanding the lack of rate-setting authority over such customers, because

> . . .[c]urtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of § 1(b) that "[t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce. . . ."[2]

The Court went on to observe that the FPC possessed broad authority to meet its curtailment responsibilities:

> Since curtailment programs fall within FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to

[2] 406 U.S. at 638.

> make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942).[3]

Relying on the holding in *Louisiana Power & Light,* the court of appeals correctly held that the inclusion of compensation arrangements in a curtailment plan, should the Commission find such arrangements to be just and reasonable, was well within the Commission's broad curtailment jurisdiction and is not proscribed by the Natural Gas Act's limitations on the Commission's rate-setting powers.[4] Since the decision of the court of appeals clearly falls within the ambit of *Louisiana Power & Light*, it should not be disturbed.

3. In two recent cases, the Court has rejected similar Commission attempts to contrue its jurisdiction narrowly. In *FPC* v. *Conway Corp.*[5] the Court held that the Commission, in evaluating the justness and reasonableness of a power company's proposed wholesale rate increase, has jurisdiction to consider allegations that the proposed rates are discriminatory and noncompetitive in relation to the company's retail rates. The Commission had urged that it had no authority to consider the allegations of unfairness based upon a relationship between the power company's wholesale and retail rates since it had no jurisdiction to change the latter rates. The Court rejected this "jurisdictional barrier,"[6] noting that the Commission had adequate power to remedy the alleged unfairness by ap-

[3] *Id.* at 642.

[4] 522 F.2d at 1349-50.

[5] — U.S. —, 44 U.S.L.W. 4777 (U.S. June 7, 1976).

[6] *Id.* at 4780.

propriate order directed to the jurisdictional rate, and that

> [t]he Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will have anticompetitive effects.[7]

Similarly, in *NAACP* v. *FPC*[8] the Court rejected the Commission's contention that it lacked jurisdiction to consider or require evidence concerning the employment procedures of the companies it regulates. As in *Conway,* the Court found the Commission's construction of its jurisdiction to be excessively limited, and held that the Commission in the exercise of its rate-making jurisdiction

> . . . has ample authority to consider whatever evidence and make whatever inquiries are necessary to determine whether a regulatee has incurred unnecessary or illegitimate costs because of racial discriminatory employment practices. 15 U.S.C. §§ 717 c(e), 717 m; 16 U.S.C. §§ 824 d(e), 824 f.[9]

The Court has held in *Conway* and *NAACP* that in carrying out its rate-making responsibilities the Commission's jurisdiction is broad and properly encompasses conditions or practices not directly regulated. Similarly, in carrying out its curtailment responsibilities, the Commission's curtailment authority as upheld in *Louisiana Power & Light* is sufficiently broad to include consideration of compensation proposals even if such consideration may impinge on areas not directly regulated.

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[7] *Id.* at 4779.

[8] — U.S. —, 44 U.S.L.W. 4659 (U.S. May 19, 1976).

[9] *Id.* at 4661.

4. There is no record support for the contention that a "compensation scheme of the sort envisioned by the court of appeals would tend to defeat the objectives of end-use curtailment. (Petition, p. 15.) Presumably, were defeat of end-use curtailment found to be the result of any particular "compensation scheme," this finding would be a basis for rejecting the scheme as an unjust and unreasonable element of a curtailment plan. It does not follow, however, that any type of compensation arrangement on United's system would be repugnant to curtailment based on end-use. Whether or not a compensation plan is approved by the FPC, it would not affect the *volumes of gas* high priority customers receive. However, the Commission should also determine—on a case-by-case basis—whether compensation to curtailed customers will make the end-use program more equitable.

5. Much of the Commission's argument in support of the petition is based upon a record not yet ripe for review by the Court. The Commission has relied upon, and reproduced in its petition, its orders in *Transcontinental Gas Pipe Line Corp.*[10] and the dissenting opinion of Judge MacKinnon in the remand of the *Transcontinental* case by the United States Court of Appeals for the District of Columbia Circuit.[11] As is evident from the petition, the compensation question in the *Transcontinental* case is still awaiting decision by the District of Columbia Circuit pending action by the Commission on further issues remanded to it. Under these circumstances, it is premature for the Com-

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[10] Docket No. RP72-99.

[11] Transcontinental Gas Pipe Line Corp. v. FPC, — F.2d — (No. 74-2036, D.C. Cir., Feb. 6, 1976).

mission to rely on excerpts from the *Transcontinental* record to support the granting of a writ of certiorari in this case.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MISSISSIPPI PUBLIC SERVICE COMMISSION, *ET AL.*,
Respondents.

RESPONSE OF MISSISSIPPI POWER COMPANY IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

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Respondents.

RESPONSE OF MISSISSIPPI POWER COMPANY IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

Mississippi Power Company (Mississippi Power), an intervenor in the proceeding below before the United States Court of Appeals for the Fifth Circuit, herein files its response in opposition to the petition for a writ of certiorari (Petition) filed by the Solicitor General on behalf of the Federal Power Commission.

Mississippi Power & Light Company (MP&L) will file a brief in opposition to the Petition in which it will set forth those arguments that Mississippi Power would make if it filed a

brief in opposition. In order to avoid duplication, Mississippi Power hereby adopts MP&L's brief in opposition to the Petition as its brief in opposition in this proceeding.

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v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1678

FEDERAL POWER COMMISSION,
PETITIONER,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A to Petition for Writ of Certiorari (Petition)) is reported at 522 F.2d 1345. One order (App.D to Petition) of the Federal Power Commission from which review was sought is reported at 52 F.P.C. 989 (1974). The other order (App. F to Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Federal Power Commission is required under the Natural Gas Act to consider if a compensation plan is necessary to insure justness and reasonableness.

STATUTES INVOLVED

In addition to those parts set out in the Petition, the Natural Gas Act, June 21, 1938, c. 566, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, provides:

> Section 16
>
> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

STATEMENT OF THE CASE

This proceeding was commenced by the filing with the Federal Power Commission (FPC) on August 5, 1974 of a "Petition of the Mississippi Public Service Commission for Extraordinary Relief" (C.A. App. pp. 1-8).[1] The petition for extraordinary relief requested that the FPC immediately initiate a proceeding to establish a means by which certain electric utilities operating in the State of Mississippi[2] could be compensated for the costs of the replacement fuel they are required to use as a result of the curtailment of natural gas deliveries by United Gas Pipe Line Company (United) below their contractual entitlements.

The petition for relief stated that because of severe curtailment of deliveries of natural gas by United, the three electric utilities had been forced to use increasingly greater quantities of fuel oil to replace the natural gas they otherwise would be entitled to under their contracts. The Mississippi Commission has permitted these electric utilities subject to its jurisdiction, to include fuel cost adjustment clauses in their retail rate schedules. Therefore, the cost of electric service in Mississippi has substantially increased to the ultimate detriment of the individual electric consumers in that state because oil is substantially more expensive than natural gas.

The petition for extraordinary relief asserted that a portion of this increased financial burden now being borne by those electric utilities and, consequently, their customers, should be shifted to other purchasers from United who have been accorded a higher priority for purposes of curtailment. In other words, the *financial* burden of curtailment should be distributed more equally.

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] Mississippi Power & Light Company (MP&L), Mississippi Power Company, and South Mississippi Electric Power Association.

After issuing a notice of the petition for extraordinary relief, the FPC denied any relief and terminated the proceeding. The basis for this denial was stated to be a lack of jurisdiction to order compensation plans because of the Natural Gas Act's requirement that a pipeline cannot be given revenues which would be greater than its cost of service plus a fair rate of return. In addition, the order stated that the FPC has no jurisdiction over the rates charged by United to its direct customers, such as the electric utilities, so as to require compensation to them.

Finally, the order concluded that the petition for relief was "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment" and that such "damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court." (Pet. App.D, pp. 22a-23a)[3]

Applications for rehearing were filed pointing out that the FPC had misconstrued both the nature of the petition for relief and the extent of its own jurisdiction. The applications stated that under a compensation plan envisioned by the petition for relief, United's rates would not be affected because the pipeline would serve merely as a conduit for funds, passing them from higher priority customers to lower priority customers such as the electric utilities. For the same reason, the compensation could not affect rates paid United by direct sales customers and the petition for relief could not possibly be an attempt to get damages from United because its own funds would not be involved (C.A. App. pp. 145, 153).

An order denying applications for rehearing simply reiterated the statements made in the order denying relief. (Pet. App. F, p. 29a). Commissioner Brooke, however, dissented on the grounds that a compensation plan was not *per se* unlawful and, at the very least, warranted an evidentiary hearing (Pet. App. F, pp. 32a-36a).

[3] "Pet. App." refers to the Appendices attached to the Petition.

The Mississippi Commission and MP&L filed the petitions for review which instituted the proceeding in the court of appeals.

The court of appeals, in a unanimous decision, set aside the FPC's order and remanded it for further proceedings. Reasoning that there was only one issue presented by the appeal, "one of law: Did the Commission have jurisdiction to effectuate relief of the type sought in the petition for extraordinary relief," the court of appeals held that the FPC did have such jurisdiction. (Pet. App. A, pp. 8a, 12a)

Relying on this Court's holding in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the court of appeals concluded that the "Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment." (Pet. App. A, p. 9a) Accordingly, the proceeding was remanded to the Commission to consider whether a compensation plan was justified. However, the court of appeals carefully pointed out that *it was imposing no requirement that the FPC should order such a plan* unless it found it to be necessary under the Natural Gas Act.

> "In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.
>
> "Having considered the breadth of the Commission's jurisdiction, the question remains what action by this court is proper. In essence, what the Commission has done is to fail to exercise its jurisdiction by refusing to consider, with an appropriate record, a proposed remedy for an asserted wrong. *We, of course, intimate no view one way or the other as to whether compensation should be included.* This court can, however, compel

the Commission to exercise its jurisdiction by considering whether compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan." (Citation omitted, emphasis supplied) (Pet. App. A, p. 12a)

ARGUMENT IN OPPOSITION

A. There are "No Special and Important Reasons" for Granting the Petition

The court of appeals simply has held that the FPC *can* order a compensation plan, but it carefully did not say that it *must* order one. The decision below did not, as the Petition alleges (p. 10), "require a general restructuring of pipeline rates for sales of natural gas." At most, the FPC is required to make a fair determination (*i.e.* based upon an appropriate record) as to whether Section 4(b) of the Natural Gas Act requires a compensation plan on United's system.

Hence, the decision does not require a radical alteration of FPC procedures nor does it immediately affect the rights of pipelines or those of its customers. All that the decision requires is a hearing, and such a proceeding involving United's system is taking place at the present moment. Indeed, testimony in support of a compensation plan was filed by MP&L on May 12, 1976 (and rebuttal testimony was served on June 16, 1976). A hearing presently is underway.

In the wording of the "Question Presented," the Petition seeks to assign an immediacy to the court of appeals' decision which does not exist:

> "Whether, in connection with its approval of pipeline curtailment plans, *the Federal Power Commission is required under the Natural Gas Act to impose, in certain circumstances, proposed compensation schemes* whereby high-priority pipeline customers would make payments to low-priority customers in full or partial compensation for the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries." (Emphasis supplied) (p. 2)

The "certain circumstances" referred to do not automatically flow from the decision (and, indeed, may never exist) but can only result from the finding of the FPC, itself, on an appropriate record, that a compensation plan is necessitated by the justness and reasonableness requirement of Section 4(b) of the Natural Gas Act.

The court of appeals did not even suggest that the FPC should favor a compensation plan but carefully stated: "We, of course, intimate no view one way or the other as to whether compensation should be included." (Pet. App. A., p. 12a) Granting the Petition will mean that this Court will be required to decide an issue having no immediate effect.[4] Denial of the petition will mean that the proceedings before the FPC will continue.

In an attempt to assign a general applicability to the court of appeals' decision that was not intended, the Petition (footnote 4, p. 10) lists a number of proceedings involving other pipelines where compensation plans have been sought. This reference demonstrates the general interest throughout the industry in the question of compensation and unintentionally emphasizes the FPC's lack of sensitivity to the industry's problems in not setting hearings to consider the remedy of compensation. Hence, the Petition is merely stating that the FPC's refusal to hold hearings has been broadly attacked. There is certainly no reason why this Court should address itself to the issue of compensation now, without a factual record below, where the FPC, itself, has refused to give adequate consideration to this issue. In effect, the FPC is asking this Court to review a question in order that it might be saved the inconvenience of doing so itself.

[4]The FPC is asking this Court to render a premature decision with no factual record below when it would not even grant the Mississippi Commission an opportunity to be heard.

Clearly, there are no "special and important reasons" for granting the Petition.

B. The Decision of the Court of Appeals Clearly was Correct.

The FPC has acted strangely ever since this proceeding was initiated. Faced with the nationwide natural gas shortage, the FPC determined, rightly or wrongly, that curtailment should be based on end use considerations and should not be implemented on a *pro rata* basis. The result of this policy determination is that some pipeline customers bear most of the burden of curtailment while others bear little or none. A compensation plan simply is an attempt more equitably to distribute the burden of end use curtailment while at the same time preserve its alleged benefits. (The lower priority customer supposedly can convert more easily to alternate fuels). A compensation plan is not, as suggested by the Petition (p. 15), inconsistent with end use curtailment but is necessary because of it. *Pro rata* curtailment would not require a compensation plan. An end use curtailment plan is supposed to afford the least economic disruption by requiring fewer and larger conversions. But, because of this, those who are required to convert are severely disrupted. A compensation plan would ameliorate this hardship and achieve a better financial balance between customers in dealing with the burden of curtailment.[5] Surely, there is a basic fairness in the concept of a compensation plan.

With all this in mind, the Mississippi Commission approached the FPC, another regulatory agency, with a

[5]These "customers" are not actually the large utilities but their individual ratepayers. Hence, a compensation plan is an attempt to avoid, for example, the situation where the person with an electric stove has his rates doubled while his next door neighbor with a gas stove relatively is unaffected.

request that it utilize its considerable experience and great resources in an attempt to set up a compensation plan which would be fair to all United's customers. Instead of making a *bona fide* attempt to deal with the problem, the FPC dismissed out of hand the Mississippi Commission's request for assistance without even giving interested parties an opportunity to present their views on how a compensation plan might be constituted.

To make matters worse, the FPC apparently did not even bother to understand the request. As will be pointed out, each of the orders indicates mistake on its face. Further, the FPC made no attempt to deal with the requested relief from an equitable standpoint but simply dismissed the proceeding with a mistaken reliance on the definition of "ratemaking."

In other words, instead of following the clear intent of the Natural Gas Act and the Federal Power Act to protect the public interest and grapple with a serious problem, the FPC retreated to a simplistic reliance on a technical interpretation of the word "ratemaking."

As previously indicated, the FPC gave as its reason for summarily dismissing the Mississippi Commission's petition for relief its lack of jurisdiction to grant the relief requested because of the Natural Gas Act's requirement that a pipeline cannot be given revenues which would be greater than its cost of service plus a fair rate of return. In addition, the order stated that the Commission has no jurisdiction over the rates charged by United to its direct customers, such as the electric utilities, so as to require compensation to them.

Finally, the order concluded that the petition was "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment" and that such "damage liability, in the context of

curtailments, is primarily a matter of contract law to be resolved by an appropriate court" (Pet. App. D, pp. 22a-23a).

Essentially, the FPC's position is that compensation payments result in some customers paying higher than just and reasonable "rates" and others paying less than just and reasonable "rates," and this violates the Natural Gas Act. An additional argument, also based on its definitions of "rates," is that compensation payments to direct customers constitute "ratemaking", and the FPC has no jurisdiction to set "rates" for direct industrial customers.

As the court of appeals correctly recognized, compensation is not a matter of *rates* but an adjustment to ameliorate the hardships of an end use *curtailment* plan. This Court gave the FPC wide latitude in administering curtailment plans in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). It is puzzling why the FPC, having extended its jurisdiction into new areas (such as direct sales) in its early administration of curtailment programs, suddenly became so timid when the remedy of compensation was suggested. Even if its jurisdiction had been questionable, the FPC should have given the compensation concept a fair hearing instead of reaching for a semantic argument on the definition of "rates" to avoid its responsibility. The court of appeals was correct in requiring the FPC to assume its responsibility under the Natural Gas Act and the Federal Power Act.[6]

Further, the FPC orders were so obviously ill-considered and incorrect that it is difficult to see how a court of

[6]This Court also recently has rejected attempts by the FPC to construe its jurisdiction narrowly. *Conway Corp.* v. *FPC*, ____ U.S. ____, 44 U.S.L.W. 4777 (U.S. June 7, 1976); *NAACP* v. *FPC*, ____ U.S. ____, 44 U.S.L.W. 4659 (U.S. May 19, 1976). These holdings are discussed at pages 5-6 of United's Brief in Opposition to Petition for a Writ of Certiorari in this proceeding, dated June 18, 1976.

appeals could have affirmed them. The FPC held that a compensation plan would violate the Natural Gas Act because it would give United *higher* than just and reasonable rates (it would give *more* money to United than it deserves) (Pet. App.D., p. 22a). On the following page, the order states that the petition must be denied because it seeks damages from United and this is a matter for the courts not the FPC. Hence, the FPC held that a compensation plan would give money to United which it does not deserve and, at the same time, it might take money away from United in damages.[7] This obvious contradiction was never explained.

Commissioner Brooke, dissenting, unlike the other Commissioners, understood that the issue in this proceeding was a matter of transferring payments *among* customers of United not *to or from* United. It is axiomatic that an administrative decision must be based upon substantial evidence. *Universal Camera* v. *NLRB*, 340 U.S. 474 (1950). Clearly, error cannot constitute substantial evidence and the court of appeals could have remanded for that reason alone.

Another reversable error was the FPC's refusal to hold a hearing even though there were factual questions to be determined. In such a situation, a hearing is required by *Citizens for Allegan County, Inc.* v. *FPC*, 414 F. 2d 1125 (D.C. Cir. 1969).

The Petition (p. 12) tries to avoid complete reliance on classifying compensation payments as "rates" by stating that any "surcharges" must be based upon a pipeline's cost of service plus a reasonable rate of return. However, Section 4(a) of the Natural Gas Act, relied upon by the FPC, specifically provides that "rates and charges" are to be

[7]The possibility of compensation payments constituting an action for damages against United apparently does not concern that pipeline. United has filed a brief *opposing* the Petition.

"made, demanded, or received *by a natural gas company.*" (Emphasis supplied) Hence, the FPC's further reliance on semantics in labeling compensation payments as "surcharges" (the Act says "charges") adds nothing to its argument. Compensation payments, whether called "rates", "charges" or "surcharges", are not made to the pipeline but to its customers. The point is that compensation payments can never be retained by a pipeline.[8]

In addition, the Petition recognizes, as it must, that penalty payments for overruns[9] (some as high as $10 per Mcf) cannot possibly meet the criteria of "just and reasonable". Its attempted answer to this devasting inconsistency is no answer at all:

> "Finally, while most curtailment plans contain a provision for penalty payments for unauthorized overtakes, *the penalty provision must be filed as part of the curtailment tariff and is evaluated under the just and reasonable standard of Section 4.* Thus, the court of appeals' reliance upon an analogy between compensation payments and overtake penalty payments (App. A, infra, pp. 10a-11a) actually supports rather than undercuts the Commission's position with respect to compensation payments." (Emphasis supplied; f.n. 6, pp. 12-13)

Surely, a compensation payment provision could "be filed as part of the curtailment tariff and [be] evaluated under the just and reasonable standards of Section 4." That was exactly what the FPC was asked to do.

---

[8]Compensation payments would not even have to be handled by a pipeline but could be collected and distributed by an outside financial institution.

[9]These penalties apply to overruns by direct "non-jurisdictional" customers in the same way as they do to resale jurisdictional customers. Hence, the argument made by Mississippi River Transmission Corporation in its response in support of Grant of Writ of certiorari is without merit.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A to Petition for Writ of Certiorari) is reported at 522 F.2d 1345. One Federal Power Commission order from which review is sought (Petition, App. D) is reported at 52 F.P.C. 989. The other order (Petition, App. F) is as yet unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the FPC's curtailment jurisdiction extends to consideration of a petition for extraordinary relief requesting the establishment of a compensation program.

STATUTES INVOLVED

In addition to those parts set out in the Petition, the Natural Gas Act, June 21, 1938, c. 566, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, provides:

Section 16

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in

convenient form for public inspection and examination during reasonable business hours.

STATEMENT

Mississippi Public Service Commission regards the statement of the Federal Power Commission as providing an adequate description of the proceedings for the purpose of determining whether to grant the Petition.

ARGUMENT

1. There are no urgent reasons dictating this Court's review since the court of appeals decided a jurisdictional issue without immediate widespread impact on the Federal Power Commission's administration of the Natural Gas Act. The court did not hold that, under the Act, the FPC was required to impose a compensation program as part of every pipeline's curtailment program. Furthermore, the court's decision will not require a general restructuring of pipeline rates for the sale of gas.

In concluding that there is no jurisdictional bar to a compensation program, the court intimated no view on the merits of compensation programs in general. The court properly never reached such broad questions. The court addressed one narrow threshold issue: whether the FPC had jurisdiction to grant MPSC's request for extraordinary relief in the form of compensation.[1] The court concluded that the

[1] At the FPC, the Commission denied on jurisdictional grounds, without formal hearing, MPSC's petition for extraordinary relief from a Commission-approved curtailment program for United Gas Pipe Line Company's system, holding it was without statutory authority to grant the relief.

FPC did. In holding that the FPC must consider whether compensation payments are necessary to insure the justness and reasonableness of a particular curtailment plan, the court mandated further proceedings at the FPC on MPSC's petition. Nothing more. The court decided a jurisdictional issue, not the compensation issue.

The court left the FPC free on remand to include *or not include* a compensation program as part of United's curtailment plan. The court went out of its way to insure that the FPC's reconsideration of MPSC's petition would be unfettered.[2]

Under the circumstances, considerations of judicial economy favor denial of the writ. No opportunity is presented by this case to review issues, other than the limited jurisdictional one, that converge about compensation proposals.

2. The court of appeals correctly determined that FPC curtailment jurisdiction extends to consideration of MPSC's petition for relief. The court's conclusion is squarely supported by decisional law.

The FPC had denied MPSC's petition because it lacked the jurisdiction to grant the requested relief. The court of appeals reviewed the jurisdictional question in two steps. First, the court assured itself that the FPC had statutory

[2] "*We do not reach the merits*, preferring to allow the Commission to reconsider the matter in light of our holding that jurisdiction exists. Moreover, any consideration on the merits in this court must be on the basis of findings made by the Commission on an adequate record." (Petition, App. A, p. 7a) (Emphasis supplied)

"*Whatever the result on remand*, the Commission should make findings supported by an adequate record, *relating to the inclusion or the failure to include compensation* as a part of a curtailment plan." (*Ibid.*, p. 12a) (Emphasis supplied)

authority to impose a system of compensation payments. The court relied on *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) and held that the FPC "is vested with both jurisdiction and broad power to solve the problems caused by curtailment." (Petition, App. A, p. 9a) Since certain economic consequences flow from the allocation of gas supply, the FPC's authority for the imposition of compensation charges would flow then from the same source as its curtailment authority, namely Section 1(b) of the Natural Gas Act. "Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission." (*id.*) Furthermore, Section 1(b) did not preclude FPC jurisdiction over compensation.[3]

Secondly, the court turned to the FPC's argument that the unlawful effects of compensation programs precluded their imposition. The court reviewed the barriers posed by the FPC to compensation. The court recognized that the core of the jurisdictional question was the character of compensation payments.[4] If compensation payments were rates, this would impermissibly involve the FPC in ratemaking for non-jurisdictional customers. The court concluded compensation payments were not rates "but in the nature of surcharges imposed in the context of a curtailment plan to insure that the

[3] The FPC's interpretation of its authority would create that "no-man's land" between federal and state regulation abjured by this Court. *FPC* v. *Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 19 (1961).

[4] "[C]haracterizing the compensation payment as either a rate in itself or a change in the rates of a natural gas company, the Commission necessarily sets up a jurisdictional barrier to compensation." (Petition, App. A, p. 10a)

burdens of curtailment are spread evenly and equitably among those affected by such plans." (id.)[5]

The petition for writ of certiorari dismisses the court's reasoning as merely substituting labels and disregarding the effect and nature of compensation payments (Petition, p. 11). But in distinguishing compensation payments and rates, the court is not characterizing for the purpose of reaching a desired result. Rather, the court's semantic distinction reflects real differences.

The Commission, in an expansive gloss on "rates" attempted to include under that umbrella payments which clearly do not fit any reasonable view of pipeline rates. Compensation payments are not rates under the Natural Gas Act because payments are not made to the pipeline. It is highly significant that no funds collected for compensation accrue to the pipelines.[6]

3. This Court has responded in two recent cases to FPC denials of jurisdiction. In both instances, the Court took exception to the FPC's narrow construction of its authority.

[5]The court analogized compensation payments to penalty provisions included by the FPC in curtailment plans to deal with the problems of overtakes (*id.*, p. 10a-11a). Petitioner misses the boat in arguing that penalty provisions actually support the FPC's position on compensation (Petition, p. 12-13). The point is not that penalty provisions are filed as part of a curtailment tariff and evaluated under the standard of Section 4 of the Act. The point, rather, is that these provisions apply *both to jurisdictional and non-jurisdictional customers*, that they are not rate-setting forbidden by Section 1(b), but simply collateral aspects, like compensation, of curtailment plans.

[6]Section 4(a) provides: "[a]*ll rates and charges made, demanded or received by a natural gas company* for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission shall be just and reasonable. (Emphasis supplied)

In *NAACP* v. *FPC*,[7] the Court endorsed a broad view of FPC jurisdiction. The NAACP and others had petitioned the FPC to issue a rule requiring equal employment opportunity and non-discrimination in the employment practices of regulated companies. The FPC denied the petition, arguing that it lacked jurisdiction to adopt the proposed rule. The court of appeals, however, held that the FPC did have the power to consider evidence of discrimination by regulated utilities in performance of its regulatory function. This Court agreed that the FPC was authorized to consider the consequences of discriminatory employment practices by regulated companies insofar as the consequences were directly related to the FPC's establishment of just and reasonable rates.

This Court in *Conway Corp.* v. *FPC*[8] rejected the FPC's argument that it did not have jurisdiction to consider allegations that a company's jurisdictional wholesale rates were discriminatory and noncompetitive in relation to its non-jurisdictional retail rates. The FPC had denied a request by a wholesale customer seeking to introduce evidence of anti-competitive activities, contending that since its authority was limited to wholesale rates, relief for anti-competitive effects would be beyond its authority. The Court was not persuaded.

> The Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will have anti-competitive effects.

Both decisions require that the FPC, in exercising its statutory responsibilities, take a broader view of its jurisdiction than reflected in its denial of MPSC's petition.

[7]____ U.S. ____, 44 U.S.L.W. 4659 (U.S. May 19, 1976)

[8]____ U.S. ____, 44 U.S.L.W. 4777 (U.S. June 7, 1976)

Louisiana Power & Light Co. v. *FPC, supra*, strongly suggests that the FPC's restricted concept of curtailment jurisdiction in this case is in error.

4. Compensation payments are not sales of natural gas for resale in interstate commerce. The FPC was plainly wrong when it said that elements of a sale are present in the payment of compensation. A sale requires a willing seller and buyer as well as the transfer of title and possession of property. Under a curtailment plan with compensation provisions, there is no transfer of gas nor of the title to gas because compensated customers never possess title to the gas for which they are compensated. Consequently, there would be no jurisdictional transaction.

Further, there is no record support for the argument that compensation programs would result in pipeline rates that violated Section 4(b) of the Act, nor that compensation programs would defeat the objectives of end use curtailment. Such issues plainly require an evidentiary hearing before such determination can be made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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Brief *Amicus Curiae* of Elizabethtown Gas Company in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION, *Petitioner,*

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

Brief *Amicus Curiae* of Elizabethtown Gas Company in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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This brief *amicus curiae* is filed, with the consent of the parties, pursuant to Rule 42.

Elizabethtown Gas Company (Elizabethtown) is a petitioner in two of the four pending Court of Appeals cases cited by the Federal Power Commission (FPC) in support of its petition for writ of certiorari.[1] Neither case warrants grant of the petition.[2] Nor do the unique

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[1] Petition for Writ, p. 10, n. 4: *Elizabethtown Gas Company* v. *Federal Power Commission;* C.A.D.C. No. 75-1767; *Transcontinental Gas Pipe Line Corporation* v. *Federal Power Commission,* C.A.D.C. Nos. 74-2036, *et al.*

[2] On May 23, 1976, the Court of Appeals (Circuit Judges MacKinnon and Robb) specifically denied the FPC's motion in No.

facts involved in the Fifth Circuit decision justify review.[3]

STATEMENT

Elizabethtown is a public utility distributing natural gas in 68 communities serving over 183,000 consumers under regulation by the New Jersey Board of Public Utility Commissioners. Elizabethtown has been in the gas distribution business for 125 years. Prior to the initiation of natural gas service by an interstate pipeline supplier in 1951, Elizabethtown manufactured the gas that it sold to consumers.

Elizabethtown currently purchases natural gas for resale from three interstate pipeline companies:[4] Columbia Gas Transmission Corporation (Columbia), Texas Eastern Transmission Corporation (Texas Eastern) and Transcontinental Gas Pipe Line Corporation (Transco). All of the wholesale service being provided to Elizabethtown by these pipeline companies was certificated by the FPC as firm, long-term service, required by the public convenience and necessity.

Each pipeline supplier is heavily curtailing service to Elizabethtown due to gas supply shortages on its its system:

75-1767 to hold the review in abeyance pending consideration of this petition for writ of certiorari.

[3] *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F.2d 1345 (5th Cir. 1975), *reh. denied en banc*, 526 F.2d 816 (5th Cir. 1976).

[4] Elizabethtown serves a very small market in Sussex County, New Jersey, which is not connected to the rest of its system. This is supplied with natural gas purchased from a fourth pipeline company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tenneco).

Pipeline	Curtailment 1975-1976 winter (actual)	Curtailment 1976 summer (estimated)	Curtailment 1976-1977 winter (estimated)
Columbia	28%	41%	26.5%
Texas Eastern	14%	28%	17%
Transco	35%	43%	39%

Elizabethtown has been advised that *next winter it will receive no gas from either Texas Eastern or Transco to meet the base requirements of its industrial consumers. Columbia anticipates that it will curtail 93% of Elizabethtown's industrial base requirements attributable to that pipeline supplier.*

The pipeline shortages being experienced by Elizabethtown are continuous, year round and worsening. Faced with this erosion, Elizabethtown has sought to obtain a proportionate share of the dwindling pipeline supplies. It has not been entirely successful in this. The curtailment plans in effect on the systems of its pipeline suppliers have been interim plans which are largely the result of negotiations among the pipeline's wholesale customers.[5] In no case has a final curtailment plan been imposed by the FPC on the basis of an evidentiary record.

Recognizing an obligation to assist other gas distribution companies to adjust to the mounting pipeline supply shortages, Elizabethtown has agreed to settle for less than a proportionate share of the available

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[5] The "pipelines sell all the gas they can during periods of shortage and consequently are not overly concerned with which customers receive it." *Pacific Gas and Electric Co.* v. *Federal Power Commission*, 506 F.2d 33, 36 (D.C. Cir. 1974).

pipeline supply where there was provision for compensation which

(1) would redress it and its consumers for the economic burden arising from the need for Elizabethtown to provide expensive supplemental gas supplies to make up the additional pipeline supply deficit caused by the disproportionate allocation, and

(2) would provide an economic goal to induce the distribution company obtaining more than a proportionate share of the pipeline supply to acquire supplemental gas supplies so that it would not claim a disproportionate share of the natural gas in the future.

The compensation provisions in past curtailment plans, approved by the FPC, served those objectives. Provision was made for the payment of compensation by the distribution company customers receiving a disproportionate share of the pipeline gas to the distribution company customers receiving less. This mitigating factor permitted the plans to comply with the anti-preference provisions of Section 4(b) of the Natural Gas Act. 15 U.S.C. 717c(b).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The four cases pending in the Courts of Appeal cited by the FPC[6] do not justify the grant of the petition for a writ of certiorari. Instead, they demonstate that the Fifth Circuit decision involved circumstances so unique that this Court should allow that case to be

[6] Petition for Writ, n. 4.

remanded to the FPC, without further comment, for the hearing which the FPC never afforded the Mississippi Public Service Commission.

This Court is not presented with a question germane to the problem of compensation in the context of Elizabethtown's pipeline suppliers.[7]

The Mississippi power plants are served directly by United Gas Pipe Line Company (United Gas).[8] Post World War II developments along the Gulf Coast resulted in United Gas serving directly a large number of rural industrial plants and electric power stations. Elizabethtown's pipeline suppliers, by contrast, make virtually no such sales:[9]

[7] The same can be said of the pipeline suppliers involved in the other two court of appeals cases cited by the FPC in note 10 of its petition for writ. Consolidated Gas Supply Corporation (C.A.D.C. No. 75-1324) serves *no* direct industrial customers. See FPC, *Statistics of Interstate Natural Gas Pipeline Companies 1973*, 303. Northwest Pipeline Corporation (C.A.D.C. No. 75-1455) serves four direct industrial customers which accounted for only 1.3% of its total sales in 1974. See *Annual Report of Northwest Pipeline Corporation to FPC for the year ended December 31, 1974*, 514.

[8] See *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[9] Data for 1973 from Federal Power Commission, *Statistics of Interstate Natural Gas Pipeline Companies 1973*, 303, 309 and 310 (1974). Tenneco, supplier to Elizabethtown's system in Sussex County, made 0.14% of its sales in 1973 to direct industrial customers. *Id.* at 309.

Pipeline	Number of direct Industrial Customers	Direct Industrial Sales as Percentage Of Total Sales
United Gas Pipe Line Co.	212	23.7%
Columbia Gas Transmission Corp.	1	0.5%
Texas Eastern Transmission Corp.	0	0%
Transcontinental Gas Pipe Line Corp.	1	0.3%

It may be appropriate to speak of "low-priority pipeline customers" and "high-priority pipeline customers" in a context where one is comparing one direct industrial sale with another being made by a pipeline supplier like United Gas. But that terminology, used by the FPC in its statement of the "Question Presented" to this Court, is not applicable to the sales made by Elizabethtown's pipeline suppliers.

Columbia, Texas Eastern and Transco sell gas to wholesale customers which serve consumers in hundreds of communities. Each wholesale customer serves a market of residential, commercial and industrial consumers. No two markets are alike. One cannot on that account call one wholesale customer a "low-priority pipeline customer" and another a "high-priority pipeline customer". Every wholesale customer serves residential and commercial consumers which are considered to be high-priority end users.

2. United Gas has been curtailing firm service on its system since November 1970. None of the interim curtailment plans in effect since then has contained a com-

pensation provision.[10] The appropriateness of inclusion of such a provision in a permanent curtailment plan on the United Gas system is now being tried in a hearing before an Administrative Law Judge of the FPC.[11]

By contrast, compensation provisions were included for several years in the interim curtailment plans of Elizabethtown's suppliers Columbia and Transco with FPC approval.[12] Such action was justified by the Commission in these terms:[13]

> "According to Columbia, the $1.65/Mcf surcharge provides an incentive to its customers to develop their own peak shaving facilities, tends to preclude customers from requesting exempt volumes except when actually needed to protect firm non-industrial loads, and compensates customers providing the exempt volumes for utilizing their peak shaving facilities. In any case, the cost of operating peak shaving equipment approximates the $1.65 surcharge. . . ."

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[10] The Courts have been called upon to review FPC determinations that United's interim curtailment plans were lawful. In each case, the FPC was reversed. See *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Louisiana Power & Light Co.* v. *Federal Power Commission*, 526 F.2d 898 (5th Cir. 1976).

[11] In *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, *et al.* (Phase II), Mississippi Power & Light Co. distributed on May 12, 1976 the proposed testimony of Witness Norris L. Stampley in support of compensation. This witness has yet to appear for cross-examination.

[12] See *Columbia Gas Transmission Corporation*, 48 F.P.C. 647 (1972); *Transcontinental Gas Pipe Line Corporation*, 46 F.P.C. 1212, 1213 (1971), 48 F.P.C. 1060, 1061 (1972).

[13] 48 F.P.C. at 650. The interim plan, with its compensation feature, was approved after the FPC found it "appropriate in carrying out the provisions of the Natural Gas Act."

What is involved in Elizabethtown's pending appeals is the *deletion* of compensation provisions without proper reference to the history of approval, the record evidence justifying continuation of the practice, or the role of compensation in insuring the continued viability of the local gas distribution industry.

3. This Court has ruled that curtailment plans are to be adjudged under the anti-preference provisions of Section 4(b) of the Natural Gas Act.[14] This requires careful consideration of the facts in each case.

Take the all too common situation where one of a pipeline's wholesale customers insists on receiving more than a proportional share of the available gas because it has not taken the steps necessary to assure that sufficient supplemental gas supplies will be on hand to meet the demands of consumers it serves which are not ready to turn to another form of energy. The pipeline supplier can deliver the requested larger volume only if other wholesale customers are in a position to get along with less gas either because they have made provision for expensive supplemental gas supplies or they are prepared to forego for a time certain of their sales.

Consumers sometimes must be protected against a lack of far-sighted arrangements by their public utility

[14] 15 U.S.C. 717c(b). See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 642. Section 4(b) provides:

> "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

suppliers. When that occurs, a preference is afforded in the curtailment plan to the wholesale customer to tide it over the difficulty.

How is the preference thus created in favor of the imprudent customer to be ameliorated so that an undue prejudice is not inflicted on other wholesale customers in violation of Section 4(b) of the Natural Gas Act?

If the favored wholesale customer could "payback" the excess volumes by taking less gas from the pipeline supplier at another time of the year, the prejudice to other customers might not be undue. But pipeline curtailments are now so deep that that form of offset to an undue preference is no longer practical.[15]

It is well to remember that the interstate pipeline companies regulated by the FPC are not public utilities. They enjoy no monopoly in providing gas service in any part of the country.[16] Nor do they have the concommitant obligation to serve. As their natural gas supplies dry up, they withdraw from the scene. The FPC's responsibilities fade away simultaneously, as it cannot commandeer a gas supply for an interstate pipeline nor oblige it to continue service when its committed reserves are gone.[17]

The wholesale customers of the pipelines cannot shed their public utility service obligations that easily.

[15] *Consolidated Edison Co. of New York* v. *Federal Power Commission*, 512 F.2d 1332, 1343 (D.C. Cir. 1975).

[16] See Sections 7(a) and 7(g) of the Natural Gas Act, 15 U.S.C. 717f(a) and 717f(g); *Granite City Steel Co.* v. *Federal Power Commission*, 320 F.2d 711 (D.C. Cir. 1963).

[17] See *Public Service Commission of New York* v. *Federal Power Commission*, 463 F.2d 824, 830 (D.C. Cir. 1972); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F.2d 675, 679 (3d Cir. 1953).

It may make sense, for a time, for such wholesale customers to give up a part of their pipeline supply to another public utility in difficulties. But there must be redress for the consequential economic injury and a built-in incentive for the advantaged public utility to assume its proper burden of meeting local market requirements from supplemental gas supplies of its own devising. Compensation provisions, properly designed, serve both purposes.[18]

4. If the FPC can find good reasons why compensation should not be paid to "low-priority" electric power plant customers to off-set the loss of their natural gas supplies, those reasons can and should be developed on an evidentiary record. The issue should not be decided by blindly striking out compensation provisions in curtailment plans of all pipeline companies regardless of design, purpose, circumstance, or reference to Section 4(b) of the Natural Gas Act.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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[18] See n. 13 *supra*. Compensation payments do not originate with the pipeline company. They are not surrogates for the payment of damages by the pipeline arising out of a shortage caused by negligence, bad faith, improvidence or breach of contract. See *Monsanto Co.* v. *Federal Power Commission*, 463 F.2d 799, 808 (D.C. Cir. 1972).

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OCTOBER TERM, 1975

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FEDERAL POWER COMMISSION,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF AMICUS CURIAE

Transcontinental Gas Pipe Line Corporation ("Transco") has received the consent of all parties of record in the proceeding below to participate in this proceeding as *amicus curiae,* as evidenced by letters filed with the Clerk on June 24, 1976.

Transco is a major interstate natural gas transmission system extending from its principal sources of supply in the Texas and Louisiana areas, onshore and

offshore, through the mid-Atlantic states to its termini in the New York Metropolitan Area. By virtue of its transportation and sale for resale of natural gas in interstate commerce, Transco is a "natural gas company" subject to regulation by the Federal Power Commission ("FPC" or "Commission") under the Natural Gas Act, 15 U.S.C. 717, *et seq.* Most of Transco's sales are to local gas distribution companies in the region traversed by the pipeline system from Alabama to New York City.

Transco's interest in this proceeding stems from the fact that it has a case pending in the United States Court of Appeals for the District of Columbia Circuit[1] which involves similar threshhold legal issues arising, however, in a far different factual setting. The Commission is seeking a determination in the instant case which would control the *Transco* case as well as several others. To quote the Commission, it hopes that a decision herein favorable to its position will "avert a spate of unnecessary administrative and judicial litigation over the merits of particular compensation schemes proposed in connection with each pipeline's curtailment plan [footnote omitted]." (FPC Pet., p. 10).[2]

Under the circumstances, Transco urges the Court, for reasons explained more fully hereinbelow, to defer action on certiorari until the *Transco* proceeding is itself ripe for review, so that other important facets of the so-called "curtailment compensation" question, arising from a different fact situation, can be considered by the Court at the same time.

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[1] *Transcontinental Gas Pipe Line Corporation, et al.* v. *F.P.C.*, D.C. Cir. Nos. 74-2036, *et al.*

[2] Reference "FPC Pet." is to the Commission's Petition for Writ of Certiorari.

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Transco adopts the statements of Opinions Below (FPC Pet., p. 1), Jurisdiction (FPC Pet., p. 2), and Statutes Involved (FPC Pet., pp. 2-5) set forth in the Commission's petition.

QUESTIONS PRESENTED

In the instant proceeding, Transco views the question presented to be:

> Whether, in connection with its approval of curtailment plans to be observed by pipeline companies, the FPC has the authority to impose a compensation plan whereby lower priority non-jurisdictional direct sale customers, who were required to secure more expensive alternate fuels because of curtailment of natural gas service, would be compensated for such increased costs by the higher priority jurisdictional resale customers who continued to receive gas service.

The issue presented in the *Transco* proceeding, while it has been characterized under the broad umbrella of "compensation", is different:

> Whether, under the Natural Gas Act, a curtailment plan for the allocation among a pipeline's customers of the pipeline's inadequate supplies, may properly include tariff provisions designed to mitigate the disparate economic impact of disproportionate allocation of the gas among these customers.

STATEMENT

To place in perspective Transco's position that the Court should defer action herein until the *Transco* case is ripe for review, we shall briefly outline the pertinent facts of the *Transco* case and its present procedural posture.

Curtailment on Transco's system has had a long and complex history, commencing in the early 1970's. So far, a series of interim curtailment procedures covering successive yearly periods has been worked out by settlement among the parties, and approved by the Commission or placed into effect by court order.

In capsule summary, in earlier periods when Transco's system curtailment percentage was relatively low, pro-rata reduction from contract entitlements, with provisions for protection of high-priority markets, was the basic methodology. The Commission having expressed its policy in Order No. 467-B in favor of so-called "end-use" curtailment, a movement away from pro-rata and toward end-use has taken place. It is important to note that throughout this early history of Transco's curtailment, some type of "compensation" was provided whereby the customers whose high-priority markets were given added protection agreed to shoulder added cost burdens in recognition thereof. Until the settlement in question, the Commission routinely approved such features, in Transco's cases as well as the curtailment procedures of other pipelines. *See, e.g.*, 46 FPC 1212 (1971), 48 FPC 1060 (1972), and 48 FPC 647 (1972).

For the curtailment plan at issue in the *Transco* proceeding, a provision was included whereby customers who were curtailed greater than system average would receive monetary credits to their bills while the bills of those who were curtailed less than system average would reflect monetary debits. This is the so-called "compensation" feature of the Transco curtailment settlement plan. The term "compensation" is a misleading characterization of what occurs since no monies flow between or among customers; rather, Transco's

costs are assessed to a greater degree against those customers who receive greater than pro-rata (system average) supplies. The rationale of this type of agreed-to "compensation" was simply to mitigate the adverse economic consequences flowing from loss of sales by the customers who consented to receive less than their pro-rata share of Transco's available supply.

Unlike the *Mississippi* case where lower-priority direct sale boiler-fuel users sought to be recompensed for the added cost of alternate fuels, the effect of the agreed-to compensation in *Transco* was that those customers who historically had a larger percentage of the high-priority markets (and thus were allocated a larger share of Transco's gas) would shoulder more of Transco's costs to help soften the rate impact on the remaining high-priority consumers served by those distributors having a smaller historical high-priority load.

Under traditional principles of utility ratemaking, gas distribution companies are permitted the opportunity to recover their costs of doing business. A large portion of such costs are "fixed" by virtue of plant investment regardless of the volume of gas service rendered. To illustrate the disparate economic impact of unequal curtailment, if two companies historically had the same costs and the same contract entitlement but suddenly one of them is left with a much smaller high-priority market than the other against which to charge its costs, the unit cost of service and the resultant rates to those few remaining customers would be much higher. The shifting of costs under the Transco settlement plan is intended as an offset to that result.

The Commission ruled that such a feature was unlawful for several reasons, and disapproved the settle-

ment in its entirety (FPC Pet., App. G and H, pp. 37a-102a). The Commission orders pending review in the *Transco* proceeding were incorporated by reference and relied upon by the Commission in denying rehearing in the *Mississippi* proceeding.

Although Transco's proceeding was first in time in terms of final agency action, it has fallen behind *Mississippi* in the course of further litigation. The gas allocation portion of the Transco settlement was placed into effect by order of the United States Court of Appeals for the District of Columbia Circuit, pending further order of the Court.[3] 511 F.2d 372 (1974). In the same order, the court of appeals adopted the suggestion of Transco and others and directed that the funds generated by operation of the compensation provisions be placed in an escrow account pending a determination of their legality.

After the compensation question had been briefed and argued, the court of appeals *sua sponte* requested information on Transco's gas supply situation, and after responses by Transco, the FPC and others, entered an order directing the Commission to investigate Transco's gas supply and report to the court within 30 days. This Court on January 19, 1976, vacated that order and remanded the case to the court of appeals for further proceedings. *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation,* 96 S.Ct. 579 (1976).

On February 6, 1976, the court of appeals remanded the case to the FPC to make a record and findings

[3] The allocation of supplies for 1973-74 is now a moot question, the period having long since expired. At issue is the so-called compensation question.

concerning Transco's supply situation. By order issued June 25, 1976, in Docket No. RP72-99, the Commission entered an order finding that a shortage existed on Transco's system requiring curtailment of service, and directed its Solicitor to lodge such order with the court of appeals. The Solicitor filed a motion to lodge on June 28, 1976.

REASONS TO DEFER ACTION ON WRIT

1. The Commission contends that the Natural Gas Act prohibits the "imposition of any scheme whereby high-priority customers under a pipeline's curtailment plan are required, as a condition of receiving natural gas deliveries, to make additional payments for the benefit of low-priority customers whose deliveries are curtailed" (FPC Pet., p. 9). The Commission hopes that prompt resolution of this question in its favor will "avert a spate of unnecessary administrative and judicial litigation", citing, among others, the *Transco* proceeding (FPC Pet., p. 10).

As shown above, however, the compensation question presented in the *Transco* proceeding is clearly distinguishable from the Commission's characterization of the question in *Mississippi,* i.e., payment by high-priority resale direct consumers to low-priority customers, and the compensation issue in *Transco* arises in a far different factual context. Therefore, before making any general determination of the lawfulness of curtailment compensation plans under the Act, this Court should have the benefit of considering this issue from a different focus, as well as the other factors and circumstances which are presented in *Transco.* Surely, the broad ruling sought by the Commission cannot rest on the narrow fact situation in *Mississippi.*

As noted above, the Commission has moved to lodge its June 25, 1976 order finding that curtailment by Transco is necessary due to its gas supply shortage, in response to the court of appeals' concern on that matter. Therefore, the court of appeals will be in a position promptly to issue its decision on the merits under this Court's direction that the case be given "swift and priority consideration".[4] In so doing, this Court expressly noted the "potential importance of a resolution on the merits of the compensation issues presented in the instant [*Transco*] case".[5]

2. The Commission's rationale in *Mississippi* was based in large part on its orders in *Transco* and the Commission's instant petition draws heavily on Judge MacKinnon's dissenting opinion to the court of appeals' February 6, 1976 remand order in *Transco*. These facts amply demonstrate the advisability of deferring action until the *Transco* proceeding has been decided by the court of appeals. Obviously, where this Court is considering review of agency policies and conclusions of law first promulgated in a specific proceeding, it would be better served to consider the record made in *that* proceeding, rather than be forced to rely exclusively on the record made in some other unrelated proceeding. This is particularly evident where, as here, the scope of the issue and factual setting of the two cases are substantially different.

3. If certiorari is nevertheless granted in *Mississippi*, Transco urges the Court to limit its review to the factual situation and issue presented therein, i.e.,

[4] *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 96 S. Ct. 579, 584 (1976).

[5] *Ibid.*

payments by high-priority jurisdictional customers to low-priority non-jurisdictional consumers, so as to preserve the question pending in the *Transco* proceeding. We submit that the preferable course of action, in terms of judicial economy, would be to consider the two proceedings jointly.

4. If the Court is disposed to act without the benefit of contemporaneous review of the *Transco* proceeding, Transco submits that the court below in *Mississippi* is clearly correct in its conclusions that compensation payments do not *ipso facto* result in discriminatory rates in violation of the Natural Gas Act and that such payments cannot properly be viewed as sales for resale requiring certification and tariff filings under the Act.[6]

The court of appeals correctly notes that "the Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment". 522 F.2d 1345, 1349. And, it is well-settled that the Commission has the power and responsibility to consider *all* factors bearing on the public interest. *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 81 S.Ct. 435, 439 (1961). Therefore, the Commission cannot ignore the economic results flowing from end-use type curtailment plans.

CONCLUSION

For the above reasons, this Court should defer action on the instant petition for writ of certiorari until other important ramifications of the curtailment compensa-

[6] Transco does not necessarily endorse the merits of any compensation scheme, such as proposed in the *Mississippi* case, whereby high-priority consumers would effectively compensate low-priority industries. This is not involved in the *Transco* case.

tion question are brought into focus in the *Transco* proceeding. Alternatively, if certiorari is granted, the Court's decision should be confined to the narrow question in *Mississippi*. In that connection, this Court should affirm the court of appeals' conclusion that curtailment compensation is not unlawful *per se* under the Natural Gas Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

BRIEF AMICUS CURIAE ON BEHALF OF CITY OF WILLCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 14, 1976

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FEDERAL POWER COMMI[illegible]ON,
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v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

BRIEF OF AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc. ("AEPCO"), oppose the granting of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Our purpose is to demonstrate that the Federal Power Commission ("FPC") seeks an advisory ruling upon an abstract question of law.

In the El Paso Natural Gas Company curtailment case (Docket No. RP72-6), AEPCO requested the FPC to hold a hearing on the issue of whether an electric utility having contractual and tariff rights to deliveries during periods of gas

shortage superior to those of other customers, which has been relegated to the lowest priority under a curtailment plan prescribed by the agency, is entitled to monetary compensation. The FPC refused to hold such hearings on the ground that it lacked jurisdiction. AEPCO brought this question before the United States Court of Appeals for the District of Columbia Circuit and it is presently pending decision in *City of Willcox and Arizona Electric Power Cooperative, Inc. v. FPC*, Nos. 74-2123, *et al.*

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 522 F.2d 1345. The subject order of the FPC and its order denying rehearing are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1975. The FPC's petition for rehearing was denied on January 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(d).

QUESTIONS PRESENTED

1. Whether in prescribing or approving a curtailment plan for a pipeline, under the procedures of Sections 4 and 5 of the Natural Gas Act which require evidentiary hearings, the FPC lacks statutory jurisdiction to hold such a hearing for the purpose of considering the merits of a plan whereby electric utilities which have been forced to absorb, in the first instance, the entire economic burden of curtailment would receive monetary payments to compensate their customers for the higher cost of substitute fuels?

2. Whether this Court should review the judgment of the Court of Appeals, not yet final, holding only that electric

utilities are entitled to an evidentiary hearing on such a compensation plan where:

> (a) The agency does not base its alleged lack of statutory jurisdiction upon any provisions of the statute, but solely upon factual findings, which are wholly unsupported by any evidence, that the *consequences* of payments under a compensation plan would not be in the public interest; and
>
> (b) No specific plan of compensation has been proposed so that the agency is seeking an advisory ruling upon an abstract question of law.

STATUTES INVOLVED

Sections 1(b), 4(a) and (b), and 7(c) of the Natural Gas Act, 15 U.S.C. 717(b), 717c(a) and (b) and 717f(c) are set forth in the Petition for Certiorari. Sections 4(e) and 5(a) of the Act are set forth in the Appendix to this Brief.

REASONS WHY WRIT SHOULD NOT BE GRANTED

1. Petitioner claims that this case is of substantial importance to the administration of the Natural Gas Act because the effect of the Court of Appeals decision "would be to require a general restructuring of pipeline rates for sales of natural gas" (Pet., pp. 10, 12). But, the general level of just and reasonable rates for each pipeline, and the lawfulness of its rate structure, will not be affected at all by a compensation plan whereby the pipeline serves as a *mere conduit* to receive compensation payments from certain of its customers and to flow through such payments to other of its customers.

A rate subject to FPC jurisdiction is paid by an *immediate customer* purchasing directly from a pipeline. But, compensation payments are paid by *end users* purchasing

from state regulated distributors, and the pipeline simply flows through such payments to other state regulated distributors. Thus, *both FPC rates and the net revenues of the pipeline itself are wholly unchanged.*

2. Petitioner argues that the Court of Appeals decided the jurisdictional issue incorrectly because "the character and effect of compensation payments must control the determination of whether they are rates or surcharges" (Pet., p. 11). We agree that this is the test, but the FPC refuses to abide by the results of its application.

The FPC's basic thesis that compensation payments are rates or charges within the purview of Section 4(a) of the Act ignores the fact that that provision is limited to "rates and charges made, demanded, or received by a natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission". There is a vast difference between revenues received by the pipeline for its own services or for the gas it sells, which must be just and reasonable, on the one hand, and a surcharge such as a penalty payment for takes by a customer in excess of its daily or seasonal curtailment allotment, on the other hand. Only the former need be cost justified. The latter have not been, and never are, cost justified. On the contrary, they are designed to be at a sufficiently high noncost level to discourage customers from overrunning their curtailment allotments in order to escape the higher cost of substitute fuels by paying a cheaper penalty. The FPC with judicial approval has set these penalty payments at a level many times in excess of the cost of alternate fuels, which are themselves much more costly than natural gas sold by the pipelines.[1]

[1]Thus, in *United Gas Pipe Line Co.*, 50 FPC 1348 (1973), the FPC approved an increase in that pipeline's penalty from $3 to $10 per Mcf. Moreover, it made no attempt to justify this increase from a cost-related standpoint. Rather, it stated (*id.* at 1369): "In our opinion United is justified in increasing the penalty in view of the importance of curtailment programs today." In its Opinion (*id.*), the FPC noted and primarily relied upon the fact that other pipelines had already increased their overrun penalties to $10 per Mcf, which is many times the incremental cost of substitute fuels over natural gas. Although challenged in Court, this increased penalty was upheld as a proper exercise of the agency's discretion in view of the scarcity of natural gas and the emergency conditions brought about by its shortage. *Consolidated Gas Supply Corp. v. FPC*, 520 F.2d 1176, 1190 (D.C. Cir. 1975).

3. Petitioner also claims that this case is of substantial importance because if the Court of Appeals decided the jurisdictional issue incorrectly, much "unnecessary administrative and judicial litigation *over the merits of particular compensation schemes*" (Pet., p. 10, emphasis added) will be avoided. But, this is only true if, as Petitioner erroneously and falsely assumes, each of the different types of compensation plans has identical impact and modes of operation and therefore generates the same legal issues. Petitioner misleadingly groups all compensation plans presently pending in agency and Court proceedings as if they were of the same species and ignores the far-reaching and vital differences between them.

The question presented by the petition for certiorari involves a skeletal proposed type of plan whereby electric utilities would be compensated for the additional cost of substitute fuel they are compelled to use as a result of having been placed in the lowest priority of curtailment. C.A. App. 3.[2] *The compensation schemes involved in the proceedings cited by petitioners are of a wholly different type.*

The most frequent type arises from a voluntary agreement between the parties as part of an overall settlement of a curtailment case whereby all customers are curtailed in accordance with the agreed upon plan, but any customer who so desires is given the option of taking more than its curtailment allotment by paying to the pipeline a fixed sum for each excess Mcf of gas taken. The pipeline in turn flows

[2]"C.A. App." refers to the joint appendix filed with the Court of Appeals.

these compensation payments through to the individual customers who have surrendered a part of their curtailment allotment for the benefit of the payor. The Transcontinental Gas Pipe Line Corporation plan pending decision before the Court of Appeals for the District of Columbia, Nos. 74-2036, *et al.* and relied upon by the FPC as showing the importance of this case (Pet., p. 11) is of this type.

Another type involves compensation paid by those distributors who receive more than their *pro rata* share of gas under an end use plan, because they have a higher portion of high priority end uses in their total load than the average distributor served by the same pipeline, to distributors in the reverse situation who suffer more than *pro rata* curtailment. These compensation payments are made for the wholly different purpose of compensating the distributor for his loss of profits and affording protection to its customers against otherwise necessary rate increases. This type of plan has been proposed in several others of the administrative proceedings referred to by Petitioner (p. 10) such as in *Panhandle Eastern Pipeline Co.*, Docket No. RP71-119 and *Consolidated Gas Supply Corp.*, Docket No. RP73-115.[3] Still another type of compensation plan applies in this same situation but contemplates that the distributor will flow through the compensation to its curtailed customers, rather than retaining it for its own benefit or for the benefit of its customers being served. Such a plan was proposed in *Texas Gas Transmission Corp.*, Docket No. RP72-64,[4] and represents the only known detailed plan of the same general type as contemplated by MPSC here.

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[3]A variation on this theme has been proposed in *Southern Natural Gas Company*, Docket No. RP74-6, whereby the compensation would be paid to distributors who are curtailed below contract demand and by those receiving gas under interruptible contracts.

[4]This compensation plan has been withdrawn as part of a settlement presently pending before the FPC for approval.

4. In any event, the FPC plainly errs in its blithe and unsupported assumption that if compensation payments involve rates, the agency lacks jurisdiction. If sales for resale result from compensation plans, they can be certificated under Section 7 of the Act. Such plans can also be processed under the rate making authority of the agency in Sections 4 and 5 of the Act or under its Section 1(b) transportation and curtailment authority. Furthermore, in the analogous situation of overrun penalties for unauthorized takes in excess of a curtailment allotment, the FPC has interchangeably disposed of the issue in both curtailment and rate[5] proceedings. The crucial issue is whether compensation schemes are in the public interest or are, as the FPC claims, *unduly* discriminatory, contrary to Section 4(b) of the Act (Pet., p. 14). This is a question of *fact* which cannot be decided in an evidentiary vacuum. Yet, the FPC has determined that all types of compensation plans are equally unlawful because of the *unknown* practical consequences of their implementation. Since the agency has never held a hearing on the type of plan at issue here, it is clearly unable to determine the *actual consequences* of its operation.

The FPC circumvents this evidentiary gap by erroneously assuming that there is a one-to-one correspondence between compensation payments and curtailment priorities so that higher priority end users will pay money which will be transmitted by the intermediary distributor and pipeline customers in the jurisdictional chain of distribution to lower priority end users. It is solely on the basis of this erroneous assumption that the FPC concludes that different rates will be charged to similarly situated customers (Pet., p. 14). But, in the real world as the FPC well knows, its jurisdiction ends

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[5]The FPC's willingness to resolve penalty questions in rate cases, such as *United Gas Pipe Line Co.*, 50 FPC 1348 (1973), is noteworthy in light of its statement here (Pet., p. 13, note 6) that such penalties "must be filed as part of the curtailment tariff. . . ." Thus, the FPC's actual practice is not consistent with the rigid, technical position taken here.

when it sets the federal priorities for serving *end use requirements* reported to the pipeline concerned by its respective pipeline customers, distributor customers and direct industrial customers. The actual use of the gas at the burner tip is a matter entirely within the regulatory power of state and local public service commissions.[6] These State Commissions do not track the FPC's curtailment plan service priorities but, rather, prescribe inconsistent priorities of their own devising. By the same token, these State Commissions will also not track the FPC's curtailment priorities for the purpose of insuring that the high priority users supposed to pay compensation under a federal plan actually pay the compensation. They may decide that the compensation should be paid by industrial consumers who are classified in lower priorities under the state curtailment plan. Or, they may spread the compensation equally in proportion to gas volumes received among all ultimate consumers served by a state regulated distributor favored by a federal curtailment plan. Thus, the FPC simply does not know, and certainly cannot control, the matter of which ultimate consumers served by a favored distributor compelled to pay compensation will actually pay the monies needed to insure that part of the economic burden of curtailment is borne by *localities* who receive more than their pro rata share of gas under a federal curtailment plan. Plainly, the FPC's finding that there will be undue discrimination rests on a foundation of shifting quicksand. Nor does this finding even if justified, show lack

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[6] As the FPC held in *Arkansas Louisiana Power Co.*, 49 FPC 1316, 1317 (1973):

> We do not regulate "the local distribution of natural gas" (Section 1(b), Natural Gas Act). Therefore our curtailment priorities specified in Opinion No. 643-A apply to Arkla's sales for resale and, where there is no sale for resale, up to the point where local distribution begins. We do not undertake to order how gas is actually allocated on the distribution systems of Arkla or its customers.

Accord: Order Denying Motions for Reconsideration, Clarification or Modification of Order 467-B, 49 FPC 1036 (1973); Order Denying Motion to Terminate Proceeding, *El Paso Natural Gas Co.*, 48 FPC 371 (1972); *United Gas Pipe Line Co.*, 46 FPC 786 (1971).

of jurisdiction since it proves, at most, that compensation plans should be *rejected on their merits after statutory hearings.*

Furthermore, the FPC clearly lacks any evidentiary basis for a finding of *undue* discrimination since it does not know the level of the cents per Mcf contribution which will be required by ultimate consumers served by favored distributors. In practice, the spreading of such compensation payments among all customers of the favored distributor reduces them to a small fraction of the unit compensation per Mcf received. Here again, the determination of whether there is undue discrimination is a *factual matter,* and the FPC is attempting to substitute a conclusive and unwarranted presumption in order to escape an evidentiary hearing which, we submit, will demonstrate the fairness and lawfulness of certain compensation plans. The FPC's arbitrary and capricious procedure of treating as evidence "facts" which have not been introduced in a record or subject to cross-examination means that its order denying hearing here rests on mere administrative fiat. Such a practice has been condemned by this Court as a deprivation of statutory fair hearing and due process of law. *Ohio Bell Telephone Co. v. Public Utility Commission,* 301 U.S. 291, 300-305; *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.,* 227 U.S. 88, 90-93.

5. The FPC's conclusion that a compensation scheme of the sort proposed by MPSC would tend to defeat the objectives of end use curtailment by financially penalizing high priority users and discouraging them from consuming natural gas is equally dependent upon incorrect and unsupported factual assumptions concerning the detailed method of operation and actual impact of compensation schemes—issues upon which no evidence has been received and no hearings have been held. Unless and until a particular end user is compelled to pay compensation in an amount which when added to the price he pays his distributor for natural gas equals or exceeds the cost of substitute fuels, compensation cannot serve as a financial disincentive for high

priority natural gas consumption. The question of whether compensation payments are too high and would have such an adverse impact upon particular end uses served by an individual distributor customer of United, unless lowered, is a *question of fact* to be determined in the very hearing the FPC has refused to hold. Certainly, this Court should not permit the FPC to conclusively presume the answer to such factual questions and then rely upon this bootstrap lifting process as the basis for findings that it lacks jurisdiction.

Nor is there any merit to the FPC's further position that since the curtailment priorities favor the higher priority users any compensation scheme is, by definition, inconsistent with the objectives of end use curtailments. The theory underlying compensation payments is that although a superior end use might entitle one customer to receive gas at the expense of another having an inferior end use, the public interest requires no more than the *transfer of gas.* It does not require the *transfer of money* in an amount equal to the higher cost of substitute fuels needed to replace curtailed natural gas volumes. A higher priority user who really needs the gas should gladly pay the compensation for the assurance of a reliable gas supply and for immunity from the difficulties and expense of converting his gas burning facilities, where such conversion is possible. On the other hand, where conversion is not possible, and the higher priority user can only burn propane, he will be paying the subordinated electric utility the difference between the latter's cost for natural gas and his higher cost for fuel oil or coal, which is much less than the cost of propane. Thus, by paying compensation, the true higher priority user will make a profit!

Yet, the FPC believes that the high priority user should receive both the *available gas* and an *economic windfall* in the form of complete immunity from contributing to any part of the higher cost of alternate fuel needed to replace natural gas and from any part of the conversion cost which electric utilities are incurring for his benefit. AEPCO submits that this is unfair and unreasonable as well as unnecessary to protect the *public interest* instead of promoting the *private interest* of the favored class of users.

In any event, even if the FPC's factual assumptions and policy arguments on this matter were valid, they justify only a finding that the MPSC proposal is lacking in *merit* and do not show lack of *jurisdiction.*

6. *The FPC is seeking from this Court an advisory opinion upon an abstract question of law.* MPSC's Petition for Extraordinary Relief did not propose any specific plan of compensation. Instead, it requested the FPC to merely "initiate a proceeding to establish a method by which the electric utilities are compensated for the additional cost of replacement fuel they are required to use as a result of having been placed in the lowest priority of curtailment" (C.A. App. 3). Thus, the FPC did not have before it, and this Court does not have presented for adjudication, any fixed and final compensation plan. Furthermore, as we have already shown, MPSC's skeletal proposal for a generalized type of compensation plan relates to *only one unique type of compensation plan* which raises wholly different legal issues than the other types of compensation plan which have been proposed. Yet, the FPC is asking this Court to hold it lacks jurisdiction to consider the merits of *any and all* compensation plans.

A reading of the question framed by the FPC (Pet., p. 2) establishes that it is seeking an advisory opinion upon a nebulous and contingent set of alternative compensation plans. Thus, the FPC *does not attempt to define* the "certain circumstances" in which it would allegedly be required[7] by

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[7]Contrary to the FPC's claim, the Court of Appeals properly refused to reach the merits since its judicial function was concluded when it remanded the case to the agency for "findings supported by an adequate record, relating to the inclusion or the failure to include compensation as part of a curtailment plan" (Pet., App., p. 12A; see also Note 8 at 7A). Thus, the court below held only that the FPC did not lack jurisdiction to order or approve a compensation plan and did not compel the agency to impose such plans.

the decision below to impose an *unspecified plurality* of "proposed compensation schemes" whereby high priority customers would pay low priority customers *either* "full or partial compensation" for the higher costs of substitute fuels.

Thus, Petitioner is seeking an advisory opinion from this Court on an abstract question of law which is beyond the scope of its judicial power under Article III of the Constitution. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 700-701; *New Jersey v. Sargent*, 269 U.S. 328, 330; *Massachusetts v. Mellon*, 262 U.S. 447, 488; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 162; *United States v. Hamburg-Amerikanische Co.*, 239 U.S. 469, 475; *Muskrat v. United States*, 219 U.S. 346.

7. Even if the petition raises an important question of federal law, which as shown is not the case here, this Court only decides questions of public importance in the context of meaningful litigation and declines to review abstract questions. *The Monrosa, et al. v. Carbon Black Export, Inc.*, 359 U.S. 180, 184; *Atlas Life Insurance Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 571-572.

The FPC seeks here a broad advisory opinion which will have far-reaching consequences beyond the scope of this narrow litigation. If it were to reverse the holding of the Court of Appeals that the FPC must hold hearings on the merits of particular types of compensation plans, this Court would be condemning in a vacuum all conceivable types of compensation plans without any knowledge of the details, impact, or operation of such plans.[8] This Court has a policy

[8]Apart from its other patent improprieties, such a holding by this Court would deprive AEPCO and all proponents of compensation plans of their statutory right to a hearing on the merits of such plans under Sections 4(e) and 5(a), set forth in the Appendix to this Brief. In addition, such a decision would sanction the FPC's failure to afford

of denying requests for such advisory rulings whose implications cannot be foreseen. As held in *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 242-244, this Court:

> . . . must be alert to avoid imposition of the jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maxim of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. [at 243]

Furthermore,

> The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision would have on the adversaries, and some useful purpose to be achieved in deciding them. [at 244]

8. It is essential to apply this rule rigorously where an administrative agency is involved because the reviewing court would otherwise unlawfully usurp administrative functions. In addition, this Court cannot constitutionally act in an administrative or legislative capacity.[9] *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*, 289 U.S. 266, 275; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444. Therefore, a question presented for decision which does not reflect the precise conclusions of the agency and the precise findings on which those conclusions

notice of the grounds of decision and an opportunity to submit record evidence *before* it makes an adverse decision and thus deny MPSC, as well as AEPCO, their constitutional right of due process under the Fifth Amendment. *Morgan v. United States*, 304 U.S. 1.

[9]This Court would be required to act in such capacity in order to sustain the FPC's position here that, on the merits, all types of compensation plans are unlawful because of their practical consequences.

are based will not be reviewed. *National Labor Relations Board v. White Swan Co.*, 313 U.S. 23, 26-27.

9. In any event, ". . . a question is improper which is so broad as to admit of one answer under one set of circumstances and a different answer under another." *White v. Johnson*, 282 U.S. 367, 371. This is exactly the case here because of the objectionable generality of the question presented as framed by the FPC and the absence of any precise findings or conclusions directed to the one type of compensation plan actually involved.[10] For, the FPC has not made any findings of fact based on record evidence to support its conclusions of lack of jurisdiction. Instead, it has simply assumed certain facts not in evidence as a basis for its conclusion that the *consequences* of compensation plans would be of such nature as to violate certain prohibitions of the Act, such as Section 4(b). Since these assumptions are challenged, the petition for certiorari raises only disputed questions of fact which are not certworthy. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441.

In any event, this is a case where the record is not "sufficiently clear and specific" to permit decision of any important federal question of law which may be presented. *Massachusetts v. Painten*, 389 U.S. 569, 561; *Kimbrough v. United States*, 364 U.S. 661; *Mitchell v. Aregon Frozen Foods Co.*, 361 U.S. 231; see concurring opinions in *Wainwright v. City of New Orleans*, 392 U.S. 598. It is noteworthy that in the cited cases certiorari was dismissed as improvidently granted where this deficiency in the record became clear at a later stage.

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[10]Only the third reason for granting the writ adduced by the FPC (Pet., pp. 15-17) is directed towards the basic feature of the MPSC plan which is that high priority users would compensate low priority users. But, this entire line of argument is based on considerations of *fact* and *policy* which show, at most, that such plans should be rejected *on their merits after statutory hearings.*

10. Finally, Petitioner seeks review of a judgment of the Court of Appeals which has remanded the case to the FPC for findings on the issue of the lawfulness and merits of a specific compensation plan. Thus, no final order or judgment has been entered and the case is not yet ripe for review by this Court. *Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 258.

CONCLUSION

For the reasons stated, AEPCO strongly opposes the granting of the Petition for Writ of Certiorari, and urges that it be promptly denied.

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July 14, 1976

APPENDIX

APPENDIX

NATURAL GAS ACT

Section 4(e), 15 U.S.C. § 717c(e):

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect, *and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.* If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges

by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.(Emphasis added).

Section 5(a), 15 U.S.C. §717d(a):

Whenever the Commission, *after a hearing* had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, *shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. (Emphasis added).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF CONSOLIDATED GAS SUPPLY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42 of the Rules of this Court, consent to the filing of this brief amicus curiae has been granted by all parties to this proceeding.

QUESTION PRESENTED

Whether the Federal Power Commission has jurisdiction pursuant to its transportation authority, as distinguished from its rate-setting authority, to consider the need for compensation to insure the justness and reasonableness under

Section 4(b) of the Natural Gas Act, 15 U.S.C. §717c(b), of a curtailment plan.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations cited in the petition, the following sections of the Natural Gas Act are also relevant to this proceeding:

> Section 4(a) of the Natural Gas Act, 15 U.S.C. §717c(a):
>
> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> Section 16 of the Natural Gas Act, 15 U.S.C. §717o:
>
> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

INTEREST OF AMICUS CURIAE

In this case,[1] the Court of Appeals for the Fifth Circuit held that the Federal Power Commission (Commission) has jurisdiction pursuant to its transportation authority under the Natural Gas Act (Act),[2] as distinguished from its rate-setting authority, to consider whether compensation payments are necessary to insure the justness and reasonableness of a curtailment plan under Section 4(b) of the Act.[3]

Consolidated Gas Supply Corporation (Consolidated) is a natural gas company that makes sales for resale in interstate commerce subject to the jurisdiction of the Commission. It is, therefore, required by Section 4(c) of the Act, 15 U.S.C. §717c(c), to file schedules showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission. When Consolidated filed its end-use curtailment plan as a part of its gas tariff for these

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[1] Mississippi Public Service Comm'n v. F.P.C., 522 F.2d 1345 (5th Cir. 1975), *petition for cert. filed sub nom.*, F.P.C. v. Mississippi Public Service Comm'n, 44 U.S.L.W. 3671 (U.S. May 19, 1976).

[2] 15 U.S.C. §717(b).

[3] Section 4(b) of the Act, 15 U.S.C. §717c(b), as made applicable to the evaluation of curtailment plans in F.P.C. v. Louisiana Power & Light Co., 406 U. S. 621 (1972), provides that there shall be no undue preferences, prejudices, advantages, or disadvantages made or granted to any person; nor shall any unreasonable differences in rates, charges, services, or facilities be maintained either between localities or classes of service with respect to the transportation or sale of natural gas subject to the Commission's jurisdiction.

regulated sales, it proposed to include a billing adjustment plan designed to alleviate discriminations and preferences in service resulting from end-use curtailment. In an order dated January 15, 1975,[4] the Commission summarily rejected Consolidated's proposed billing adjustment provision; and, by order of March 10, 1975,[5] the Commission denied Consolidated's Application for Rehearing. Consolidated has petitioned for review of both Commission orders.[6]

The Petition for Certiorari filed by the Solicitor General on behalf of the Commission makes specific reference to the Consolidated proceedings and states that a reversal of the Fifth Circuit's decision in this case will be dispositive of the issues presented in Consolidated's case. Petitioner's Brief For Certiorari at 10.

Consolidated is further interested in this proceeding since it purchases a part of its gas supplies at wholesale from companies that purchase gas from United Gas Pipe Line Company (United). This case arises out of a petition for extraordinary relief from United's curtailment program. Consolidated is a party by intervention to the curtailment proceeding before the Commission and will participate on the merits in any remand of the *Mississippi* proceeding.

REASONS FOR DENYING THE WRIT

This case arises in the context of a nationwide shortage of natural gas and the problems inherent in end-use curtailment of deliveries of natural gas. Because of the adverse

[4]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Accepting For Filing and Suspending Proposed Revised Tariff Sheets and Establishing Procedures (F.P.C. Jan. 15, 1975).

[5]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Denying Rehearing (F.P.C. Mar. 10, 1975).

[6]Consolidated Gas Supply Corp. v. F.P.C., *petition for review filed*, No. 75-1324, D.C. Cir., Mar. 31, 1975.

economic impact of end-use curtailment, pipelines and customers of pipelines have submitted to the Commission various proposals to spread the economic burdens of curtailment. Although no two proposals are identical as, indeed, no two curtailment plans are identical, all have been loosely categorized by the Commission as "compensation schemes." Each time the Commission has been confronted with a "compensation scheme" it has refused to consider the proposal, asserting a lack of jurisdiction. The Commission has determined that all such "compensation schemes" are properly classified as a part of the rate charged by a pipeline to its customers. It has relied on this determination to assert a lack of jurisdiction over proposed compensation plans in cases, such as the case currently before this Court, where the parties requesting relief are within the Commission's transportation authority but not within its rate authority.[7] In other cases, such as the *Consolidated* case, where the Commission clearly has rate-setting authority over sales to the pipeline's resale customers, the Commission has declined jurisdiction over proposed billing adjustment provisions on the grounds that such billing adjustments constitute changes in rates in violation of Section 4 of the Act[8] and would result in a release of gas by one jurisdictional customer to another without the requisite Section 7 certificate.[9]

Thus, two clearly distinct issues are raised by the Commission's analysis of the compensation question: (1) whether the Commission has jurisdiction under its transportation authority to consider such payments; and (2) whether the Commission has jurisdiction under its rate-setting authority to determine whether such payments are legal. Although both issues are currently in litigation, the case

[7]United Gas Pipe Line Co., Docket No. RP74-37-12, Order Denying Petition For Extraordinary Relief, Granting Interventions, and Terminating Proceedings (F.P.C. Oct. 18, 1974).

[8]15 U.S.C. §717c(a).

[9]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Accepting For Filing and Suspending Proposed Revised Tariff Sheets and Establishing Procedures (F.P.C. Jan. 15, 1975).

pending before this Court presents only the former. As such, it cannot be considered as representative of the industry-wide problems resulting from end-use curtailment. Indeed, even if the merits of this case could be considered at this stage of the proceedings, the Court would be attempting to address itself to vast industry-wide problems by reviewing claims for compensation from the perspective of direct sales customers who represent only a small percentage of total sales of natural gas[10] by federally regulated pipelines (jurisdictional pipelines). The Court would not have the benefit of the perspective of the customers who are within the Commission's rate-setting authority and who account for approximately 83 percent of all jurisdictional pipeline sales of natural gas.[11]

The Fifth Circuit has ruled in this case that such plans are properly considered under the Commission's transportation authority. The second issue stated above was never reached, nor could it have been since the customers requesting relief were not within the Commission's rate-setting authority. That issue, the *per se* illegality of such payments, is currently being litigated in the District of Columbia Circuit.

On March 31, 1975 Consolidated filed its petition in the District of Columbia Circuit for review of the Commission's orders determining that the billing adjustment provision in its tariff is *per se* illegal (Appendix A hereto).[12] Similar petitions for review of other Commission orders summarily rejecting

[10]Sales of natural gas to direct sales customers of federally regulated pipelines account for only approximately 17 percent of all natural gas sold by such pipelines. *Fifty-Fourth Report, Federal Power Commission,* at 34 (1974).

[11]*Fifty-Fourth Annual Report, Federal Power Commission,* at 34 (1974).

[12]By consent of the parties, the case is being held in abeyance pending a determination by this Court on the Petition for Certiorari filed in this case.

various compensation plans as to jurisdictional customers were filed in the Court of Appeals for the District of Columbia Circuit by Cascade Natural Gas Corporation, Elizabethtown Gas Company, and Transcontinental Gas Pipe Line Corporation (Transco).[13]

Whether the Commission's decision in the above-cited proceedings will be upheld or set aside by the District of Columbia Circuit, it appears likely that one of the parties will petition for review in this Court.

For the reasons stated below, Consolidated submits that the issue presented in the Petition for Certiorari is premature and that the narrow jurisdictional question actually before this Court is not of sufficient importance to warrant review. Consolidated, therefore, respectfully requests that this Court deny the present Petition for Writ of Certiorari so that the issue raised by the Solicitor General's petition on behalf of the Commission can be considered when it is properly before this Court.

If this Court should grant certiorari herein, Consolidated respectfully requests that the Court defer briefing and oral argument on the merits until the Court of Appeals for the District of Columbia Circuit has had an opportunity to rule on the issues presented in the *Consolidated* case. The District

[13]Cascade Natural Gas Corp. v. F.P.C., No. 75-1455 (D.C. Cir. filed May 6, 1975); Elizabethtown Gas Co. v. F.P.C., No. 75–1767 (D. C. Cir. filed August 7, 1975); Transcontinental Gas Pipe Line Corp., et al. v. F.P.C., CADC Nos. 74-2036, et al. The proceedings in Cascade Natural Gas Corp. are currently being held in abeyance pending a final determination by the District of Columbia Circuit in Transcontinental Gas Pipe Line Corp. In Elizabethtown Gas Co., the petitioner filed its brief on May 25, 1975, and pursuant to the Court's order of June 11, 1976, the Commission's brief is due five days following a decision by the Court on an intervenor's motion to have the case dismissed for mootness. In the Transcontinental proceedings, following this Court's remand of that case to the District of Columbia Circuit, and following the District of Columbia Circuit's subsequent remand of the case to the Commission, the Commission on June 23, 1976, issued an order finding that a natural gas shortage exists on Transco's system. As of this date, no further action has been taken in the Transcontinental proceedings.

of Columbia Circuit's opinion in the *Consolidated* case, concerning the broader national question of whether gas tariff provisions subject to the Commission's rate-setting authority are illegal *per se*, will provide this Court with considerable assistance as well as a judicial determination from which it can exercise appellate review.

If this Court grants certiorari and decides the issue presented by this case, it will not dispose of the different issues presented by the cases pending in the District of Columbia Circuit. The Court may, therefore, be required to speak further when and if petitions to review those proceedings are filed and granted.

I. The Issue Presented By The Petition Is Premature

The Petition for Certiorari misstates the issue before this Court. The petition states that the question presented is whether the Commission is "required to impose . . . proposed compensation schemes." By using a broad brush, the petition attempts to seek a judicial determination of the legality of billing adjustment provisions subject to the Commission's *rate-setting authority*—the issue presented in the *Consolidated* proceedings—rather than a review of the narrow jurisdictional question decided by the Fifth Circuit—that the Commission has jurisdiction under its *transportation authority* to consider the need for compensation payments as a part of a curtailment plan. The Fifth Circuit's limited holding in this case delineates the scope of this Court's appellate review.

The Fifth Circuit determined only that the Commission has jurisdiction pursuant to its transportation authority under the Act to consider "*whether* compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan."[14] The Court specifically refrained from intimating any view as to whether compensation should or should not be included in a curtailment plan. Similarly, the issue as to whether the Commission is "required" to impose compensation schemes as a part of curtailment plans, as stated in the petition, is not

[14] Mississippi Public Service Comm'n v. FPC, 522 F.2d 1345, 1350 (D.C. Cir. 1975).

before this Court. That issue goes to the merits of whether, absent compensation, a curtailment plan is unjust and unreasonable. A determination of this issue assumes jurisdiction of the Commission and must be evaluated on the facts of the particular case.

The merits of the justness and reasonableness of the United plan absent the proposed compensation scheme has not been determined by either the Commission or the Fifth Circuit. It is well established that this Court will decline to consider questions "not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Thus, in *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970), where the issue before the Court was whether the Court of Appeals had properly dismissed the NLRB's petition for enforcement of a cease-and-desist order, the Court specifically refrained from determining whether enforcement was appropriate. In response to the respondent's assertion that, since the Court of Appeals had the entire record before it, its decision should be construed as determining that enforcement was inappropriate, the Court stated:

> "We need not pause to consider whether such a determination would have been proper on the facts of this case. The simple answer is that the Court of Appeals did not pass upon the merits of the Board's petition for enforcement." 398 U.S. at 28-29.

See, Tacon v. Arizona, 410 U.S. 351 (1973); *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945); *Gila Valley, Globe & Northern Ry. v. Hall*, 232 U.S. 94 (1914).

Indeed, in a related case, *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), the Fifth Circuit has affirmed the order of the United States District Court for the Southern District of Mississippi remanding the case to the Commission. In that case, Mississippi Power & Light Company's claim requests damages for the same financial loss for which it seeks compensation in this case. In agreeing that the District Court properly stayed the proceedings pending the exercise of primary jurisdiction

by the Commission, the Fifth Circuit stressed the importance and advisability of invoking primary jurisdiction when an issue is already before the agency. As the Fifth Circuit stated:

> "There . . . can be no doubt that the Commission's informed opinion will be of material aid to the district court . . . . First, the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing. Development of the factual context by those expert in the area, is an established basis for primary jurisdiction . . . . Fourth, the Commission is presently reviewing a request by MP&L for compensation from the customers of United who receive higher priorities. In that proceeding MP&L seeks payment for some of the very damages which it claims in this damage action . . . ." 532 F.2d at 420.

In so stating, the Fifth Circuit properly concluded that the issues in both cases are related and should be heard at the Commission level during the hearings currently in progress regarding United's curtailment plan. It is, therefore, particularly inappropriate for this Court to reach the merits of this case.

Additionally, the Fifth Circuit did not consider whether, in a proper case, the Commission would have jurisdiction under its rate-setting authority to approve a billing adjustment provision included in a proposed tariff. Indeed, the court could not have decided that issue since the parties requesting relief were direct customers of United and, therefore, not subject to the Commission's rate-setting authority. The court merely stated that, in the case before it, the Commission "necessarily sets up a jurisdictional barrier to compensation" by categorizing the proposed compensation payments as rates.[15] Had the Court of Appeals determined that the Commission's jurisdiction over compensation arose from its rate-setting authority, a jurisdictional barrier would indeed have been created in this case. However, that jurisdictional

[15] Mississippi Public Service Comm'n v. FPC, 522 F.2d at 1350.

barrier would not be present in the cases cited by the Petition as being controlled by the decision here. In all such other cases, the Commission had rate-setting authority over the pipeline's sales for resale and jurisdiction over any billing adjustments needed to offset disproportionate end-use curtailment among such customers.

The Petition for Certiorari requests that the Court address itself to all of these issues. It attempts to cloud the actual issue before this Court by referring to this Court's decision in *FPC v. Transcontinental Gas Pipe Line Corp.*, 44 U.S.L.W. 3413 (U.S. Jan. 19, 1976). In that case, this Court noted " 'the potential importance of a resolution on the merits of the compensation issue presented in the instant case' (slip op. 5)." Petitioner's Brief For Certiorari at 11. Petitioner states that these issues are "squarely presented by this petition." Petitioner's Brief For Certiorari at 11. While the petition may well "squarely present" those issues, the case that the petition seeks to have brought before this Court does not.

The question that this Court is asked to decide by the Petition for Certiorari, and that Consolidated asserts is not presented by this case, is currently under consideration by the Court of Appeals for the District of Columbia Circuit in *Consolidated Gas Supply Corp. v. FPC*, petition for review filed No. 75-1324, D.C. Cir. March 31, 1975. In this proceeding, while recognizing that it had rate-setting authority over the pipeline's customers, the Commission asserted a lack of jurisdiction to review the proposed billing adjustment provision on the ground that such provision was illegal *per se*.

By stating the "Question Presented" in such a broad manner, the petitioner attempts to deprive Consolidated, and all others whose cases are currently pending in the District of Columbia Circuit and cited in the petition, of the opportunity to have the legal issues presented in their cases decided by the Court of Appeals.

II. The Issue Actually Before This Court Does Not Warrant Review

The issue actually before this Court, whether the Commission has jurisdiction pursuant to its transportation authority to consider whether compensation in favor of non-jurisdictional customers is needed to render an end-use curtailment plan just and reasonable under the Act, does not warrant review. Since this Court's decision in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), deciding that the Commission's jurisdiction to consider and approve curtailment plans is broad based and specifically encompasses the authority to " 'make the pragmatic adjustments which may be called for by particular circumstances'," [16] the issue presented by this case is no longer a matter for debate.

Until this Court's decision in *FPC v. Louisiana Power & Light Co.*, it was unclear whether the Commission had jurisdiction to regulate plans involving the curtailment of natural gas deliveries to both direct and resale customers of an interstate pipeline. In that case this Court rejected the idea that curtailment regulations involved rate-setting and held that the Commission had jurisdiction under its independent authority over the transportation of natural gas to authorize curtailment of direct sales customers not subject to its rate authority. In delineating the scope of the Commission's authority over curtailment plans, the Court stated that "the Commission must possess broad powers to devise effective means to meet these responsibilities." [17] This needed flexibility is provided by Section 16 of the Act which gives the Commission the

> "... power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." [18]

[16] 406 U.S. at 642 quoting from FPC v. Natural Gas Pipeline, 315 U.S. 575, 586 (1942).

[17] FPC v. Louisiana Power & Light Co., 406 U.S. at 642.

After *Louisiana Power & Light Co.*, several opinions by the United States Circuit Courts have reaffirmed the Commission's broad-based jurisdiction under the Act for "pervasive regulation of the curtailment question." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976). *See e.g., Fort Pierce Utility Authority v. FPC*, 526 F.2d 993 (5th Cir. 1976); *Consolidated Edison Co. of New York v. FPC*, 512 F.2d 1332 (D.C. Cir. 1975), modified 518 F.2d 448 (D.C. Cir. 1975).

In the *Fort Pierce* case, the Commission found that it had jurisdiction to consider and grant the petition of a direct customer of Florida Gas Transmission Company for extraordinary relief but that it did not have jurisdiction to consider whether a compensation scheme was necessary to mitigate the adverse economic impact to other direct customers created by the granting of the petition. The Fifth Circuit upheld the Commission's order granting the petition for extraordinary relief but reversed the Commission's decision that it did not have jurisdiction over the compensation question. In so ruling, the Court responded to the challenge that the Commission did not have jurisdiction to grant extraordinary relief in the form of additional gas supplies to direct customers by stating:

> "In construing jurisdiction under the Natural Gas Act, this Court must be cognizant of Congress' intent to create a comprehensive and effective regulatory scheme. *See, Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 520 ... (1947) .... *The Commission must have the power to avoid untoward results to individual customers who would be irreparably harmed by the operation of a curtailment plan which is otherwise satisfactory.*" 526 F.2d at 998 (Emphasis added).

Similarly, in *Consolidated Edison Co. v. FPC, supra*, it was held that although the Commission has no jurisdiction

[18] 15 U.S.C. §717o.

whatsoever over intrastate indirect customers of a jurisdictional pipeline, it may properly consider the end-use of such indirect customers in determining priorities for curtailment.

The jurisdiction of the Commission over curtailment plans and the problems created by such plans is clear. As this Court stated:

> "Section 16 of the Act assures the F.P.C. the necessary degree of flexibility . . . .
>
> * * *
>
> In applying this section, we have held that 'the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely, the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); see *United Gas Pipe Line Co. v. F.P.C.*, 385 U.S. 83, 89-90 (1966)."

Federal Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 642 (1972).

CONCLUSION

The issues presented are premature and do not warrant review by this Court. For the reasons stated above, we respectfully request that this Court deny the Petition for Certiorari.

Respectfully submitted,

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July 14, 1976

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Consolidated Natural Gas Company) Docket No. RP73-115

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED REVISED TARIFF SHEETS AND ESTABLISHING PROCEDURES

(Issued January 15, 1975)

On December 16, 1974, Consolidated Gas Supply Corporation (Consolidated) tendered for filing Second Revised Sheet No. 51-A, Second Revised Sheet No. 51-B, and Second Revised Sheet No. 51-C to its FPC Gas Tariff, First Revised Volume No. 1 to be effective as of December 15, 1975. Notice of these filings was issued on December 31, 1974.

Consolidated's Tariff Sheets now in effect provide for curtailment of certain partial requirements customers of Consolidated on a *pro rata* basis and that the gas shortage curtailment provisions in the revised Tariff Sheets provide for end use curtailment.

Additionally, the Tariff Sheets now in effect provide for the determination of industrial requirements on the basis of the highest twelve consecutive calendar months in the most recent twenty-four month period for which data is available. The revised Tariff Sheets will provide for the curtailment of industrial requirements on the basis of data for the twelve month period ended September 30, 1974.

The Revised Tariff Sheets would also permit the filing of petitions for extraordinary relief by any Buyer, including the Hope Natural Division, on behalf of any consumer.

Consolidated requests that the Tariff Sheets be made effective as of December 15, 1974, without suspension or with suspension for only one day to facilitate the orderly implementation of curtailment.

After reviewing the proposed revised tariff sheets, we believe that they may possibly be unjust, unreasonable, unduly discriminatory or otherwise unlawful. This conclusion is founded primarily on the fact that Consolidated's current curtailment tariff is pending before a Presiding Administrative Law Judge for decision thereon. Accordingly, we shall accept Consolidated's proposed tariff revisions for filing and suspend them for one day until January 17, 1975, when they shall be permitted to take effect. In view of the fact that the hearings in Docket No. RP73-115, *et al.*, have been completed and briefs have been filed by the parties, it would appear that a reopening of the record is in order for the purpose of receiving evidence in connection with Consolidated's revised tariff sheets. Additionally, with the proposed imposition of curtailment on the Consolidated system as of February 1, 1975, we believe that the record should include end use data with respect to the base periods that will actually be employed. To the extent that there is any change in this regard from the end use and curtailment implementation data currently in the record, we believe that Consolidated should present supplementary evidence reflecting such changes.

We shall therefore direct the Presiding Administrative Law Judge in these proceedings to convene a formal conference for the purpose of determining the scheduling of dates for the further evidentiary hearings.

Finally, we note, as in the curtailment filings of Transcontinental Gas Pipe Line Corporation (Transco) that Consolidated's curtailment sheets here under consideration and those currently in effect have a compensation feature for a customer company releasing exemption gas which we have found to be ineffective lacking a proper Section 7 certification. Therefore, for the reasons stated in our Transcontinental order[1] pending

[1] "Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement," issued January 10, 1975, *Transcontinental Gas Pipe Line Corporation, et al.*, Docket No. RP72-99, *et al.*

hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act.

The Commission finds:

(1) It is necessary and appropriate in the public interest and to aid in the enforcement of the Natural Gas Act that the Revised Tariff Sheets herein described and submitted by Consolidated on December 16, 1974, be accepted for filing, suspended for one day and permitted to become effective January 17, 1975, subject to the terms and conditions of this order.

(2) It is necessary and appropriate that the Presiding Administrative Law Judge be directed to convene a formal conference for the purpose of determining the scheduling of dates for the further evidentiary hearings.

The Commission orders:

(A) Consolidated's filing of December 16, 1974, is hereby accepted for filing, suspended for one day and permitted to become effective January 17, 1975, pursuant to Section 154.67(a) of the Commission's Regulations and pending further Commission order or opinion in this docket.

(B) The Presiding Administrative Law Judge in these proceedings is hereby directed to convene a formal conference on or before February 28, 1975. In conformance with this order, the purpose of such formal conference shall be to determine the scheduling of dates for the further evidentiary hearings.

By the Commission. Commissioner Brooke, dissenting in part, filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Secretary.

Consolidated Natural Gas Company) Docket No. RP73-115

BROOKE, Commissioner, *dissenting in part:*

The presently effective tariffs of Consolidated provide the mechanism for transfer of exemption gas with payment of a surcharge, and this issue is presently being litigated before an Administrative Law Judge. For the same reasons set forth on the same issue in my dissent in the *Transco* case, I dissent here. The Commission order on Page 2 states that:

> "Pending hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the (Natural Gas) Act."

Summarily, and peremptorily, without opportunity for hearing, the Commission nullifies provisions of legally effective tariff sheets, as a matter of law, on which the company and its customers had relied to manage system supply shortages this winter. A far more preferable option, in my opinion, would have been to defer decision to the Presiding Judge on the merits of the evidentiary record in the on-going case. Realistically, the option stands no chance because of the Commission's arbitrary action in *Transco.* Here, as in *Transco,* the Commission's action is legally suspect.

/s/ Albert B. Brooke, Jr.

Albert B. Brooke, Jr.
Commissioner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer, and Don S. Smith.

Consolidated Gas Supply Corporation) Docket No. RP73-115

ORDER DENYING REHEARING

(Issued March 10, 1975)

The Consolidated Gas Supply Corporation seeks rehearing of our order of January 15, 1975, in this proceeding. In that order we accepted for filing, and suspended for one day, tariff sheets that had been filed by Consolidated on December 16, 1974, and we ordered hearings. Our order further noted that Consolidated's filing contained a "compensation feature", and on this point we stated:

> Finally, we note, as in the curtailment filings of Transcontinental Gas Pipe Line Corporation (Transco) that Consolidated's curtailment sheets here under consideration and those currently in effect have a compensation feature for a customer company releasing exemption gas which we have found to be ineffective lacking a proper Section 7 certification. Therefore, for the reasons stated in our Transcontinental order . . . pending hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the [Natural Gas] Act. (p. 2)

On February 14 Consolidated applied for rehearing. Its application relates to the paragraph quoted above. Consolidated argues that our order is factually erroneous; that payments under its compensation plan should be permitted to be made but placed in escrow; and that we erred in our reference to the need for Sections 4 and 7 filings.

As to its first point, Consolidated states that its tariff does not involve "exemption gas" or any "transfer of entitlements". While our language may have been infelicitous, our conclusion was and is appropriate, and we adhere to it. That is to say, what Consolidated terms its "billing adjustments to reflect non-uniform curtailment", we view as not different in substance from the compensation plan of the Transcontinental Gas Pipe Line Corporation. In our order of January 10, 1975, in the *Transco* case (Docket No. RP72-99), we concluded that the Transco plan is unlawful for the reason, among others, that Sections 4 and 7 of the Natural Gas Act would be violated in the absence of filings pursuant to them. That the Transco and Consolidated plans are similar is clear. Consolidated states that, to implement its proposed billing adjustments,

> . . . it will be necessary for Consolidated to collect additional revenue from customers who are curtailed less than the system average so that such funds will be available for payment to customers who are curtailed by more than the system average. (Application, p. 4)

We described the Transco plan as providing

> . . . that those customers of Transco who are curtailed most heavily will receive compensation, and that such compensation will be paid by the Transco customers who are less heavily curtailed. (Order of January 10, 1975, supra, p. 5)

In the first instance in *Transco*, as in *Consolidated*, the "system average" would provide the dividing line. Accordingly, for Consolidated as well as for Transco, we remain of the view that the Consolidated "billing adjustments" cannot be made effective "until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act".

As to Consolidated's request that the additional revenue provided for under its billing adjustments be permitted to be collected, with the funds placed in an escrow account, we find it necessary to deny the request. Consolidated states that all of its new tariff provisions, including those that provide for billing adjustments, are now in effect and have been since January 17,

1975, pursuant to the findings and ordering clauses of our order of January 15. But Consolidated also recognizes that we may not have intended this result, given the language on page 2 (quoted above) of our January 15 order. Consolidated is quite right. We did not intend that section 11.04 of its tariff (which provides for the billing adjustments) would become effective, for it is unacceptable as a matter of law. We shall clarify the matter in this order.

In the meantime, we deny the request for an escrow arrangement. We do so because we view the compensation plan, or billing adjustment, as unlawful, and we think it would be inappropriate for us to act in a way that would permit the implementation of an unlawful scheme. We recognize that, pending resolution of the question of legality of Transco's compensation plan by the Court of Appeals, the court did accept the suggestion of escrow arrangements. That action, however, was taken by the court, and we are not ourselves disposed to take similar action.

Finally, Consolidated argues that our Section 4 and Section 7 objections—in effect incorporated from the *Transco* order of January 10—are not well taken. It says that under its billing adjustment, there will be no voluntary "sales" in interstate commerce, so that rate filings under Section 4 and certificates under Section 7 are unnecessary. As in the *Transco* case, we think that "sales" are here involved. We stated in the *Transco* order that we have entered uncharted ground, and there we remain, but our best judgement is that the billing adjustments here involved—designed as they are to ease the pain of curtailment—constitute sales as a matter of law. As such they cannot occur unless there has been compliance with Sections 4 and 7.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed by the Consolidated Gas Supply Corporation in this proceeding present no facts or legal principles that would warrant any change in or modification of the Order issued January 15, 1975, in this proceeding, except that (1) there should be added at the end of Finding Clause (1) of such Order the words ", except that Section 11.04 on Second Revised Sheet No. 51-C is unlawful and shall not

become effective", and (2) there should be added at the beginning of Ordering Clause (A) of such Order the words "Except for Section 11.04 of Second Revised Sheet No. 51-C,".

The Commission orders:

(A) The Order issued January 15, 1975, in this proceeding is amended as set forth in the above finding.

(B) The application for rehearing is denied.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

Supreme Court, U. S.
FILED
JUL 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PIEDMONT NATURAL GAS COMPANY, INC., PUBLIC SERVICE COMPANY OF NORTH CAROLINA, AND NORTH CAROLINA NATURAL GAS CORPORATION *AMICI CURIAE* IN OPPOSITION

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BRIEF FOR PIEDMONT NATURAL GAS COMPANY, INC., PUBLIC SERVICE COMPANY OF NORTH CAROLINA, AND NORTH CAROLINA NATURAL GAS CORPORATION *AMICI CURIAE* IN OPPOSITION

Piedmont Natural Gas Company, Inc., Public Service Company of North Carolina, and North Carolina Natural Gas Corporation (North Carolina Distributors) having obtained the consent of all the active parties pursuant to Rule 42 of this Court, hereby submit this brief *amici curiae* in opposition to the petition for writ of certiorari filed herein by the Federal Power Commission.

AMICI

The North Carolina Distributors are three of the major distributors of natural gas in North Carolina. Piedmont owns and operates under franchises natural gas distribution systems in 60 cities, towns and communities in the Piedmont area of North Carolina and South Carolina with an aggregate population of approximately 1,300,000. Among the 42 North Carolina communities served are Charlotte, Winston-Salem, Greensboro, Burlington, High Point, Salisbury, Hickory, Lincolnton, and Morganton. Piedmont serves approximately 156,000 residential customers, about 20,000 commercial customers and about 1,100 industrial customers.

Public Service Company owns and operates under franchises natural gas distribution systems in some 75 cities, towns and communities in central and western North Carolina with an aggregate population of 900,000. Among the communities served by it are Raleigh, Durham, Concord, Statesville, Gastonia and Asheville. It serves about 105,000 residential customers, 18,000 commercial customers and about 700 industrial and other customers.

North Carolina Natural owns and operates under franchises natural gas distribution systems in some 55 cities, towns and communities in 27 counties in southern and eastern North Carolina with an aggregate population of about 1,500,000. Among the North Carolina communities served are Waynesboro, Fayetteville, Wilmington, Goldsboro, Newbern and Fort Bragg. North Carolina Natural serves about 65,000 residential customers, 6,400 commercial customers and 280 industrial customers.

INTEREST OF AMICI

The instant proceeding raises question as to the authority of the Federal Power Commission to include compensation provisions in natural gas curtailment plans made necessary by the intensifying shortage of that premium fuel. The Commission's denial of such authority in the instant proceeding was based on reasoning which it previously invoked in support of similar denial in the curtailment proceeding in *Transcontinental Gas Pipe Line Corporation* (Transco), Docket No. RP72-99. See orders issued November 12, 1974 and January 10, 1975, in that proceeding (Pet. App. G, pp. 37a-72a; Pet. App. H, pp. 73a-102a, respectively).[1]

On appeal, the Court of Appeals for the Fifth Circuit set aside the Commission's self-denial of such authority and remanded the case for further proceedings in light thereof. The Commission's petition seeking review of that ruling of the Court of Appeals reiterates and relies heavily upon orders and opinions issued in the Transco proceedings.

The North Carolina Distributors buy all the gas distributed by them in North Carolina from Transco and have been active in the litigation before the Commission and the Courts with regard to the Commission's authority to approve compensation provisions in the curtailment plan involved in the Transco controversy. The North Carolina Distributors and

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[1] Although the Commission's orders in the Transco proceeding were issued before its orders in the instant proceeding, and judicial review was sought of these orders (see *Transcontinental Gas Pipe Line Corporation, et al. v. F.P.C.*, D.C. Cir. No. 74-2036, *et al.*), the Court of Appeals *sua sponte* raised questions as to the existence of a natural gas supply shortage (see order issued August 1, 1975 vacated by this Court on January 19, 1976; see *F.P.C. v. Transcontinental Gas Pipe Line Corporation*, 423 U.S. , 96 S.Ct. 579 (1976). As a result, the question as to compensation authority in the Transco proceeding is pending undecided before the Court of Appeals.

their ultimate consumers have a substantial interest in the funds which have been collected under the curtailment plan involved in Transco litigation and which are being held in escrow pending resolution of the Commission's authority in this regard.

Since it is thus clear that the Court's action in the instant case might affect the resolution of the compensation issue in the Transco litigation, it is apparent that the North Carolina Distributors are vitally interested in, and may be affected by, the Court's disposition of this question in the instant proceeding.

QUESTION PRESENTED

The Commission's statement of the question presented (Pet., p. 2) exceeds the holding of the Court of Appeals. While the court below held that the Commission's curtailment authority extended to the inclusion of compensation provisions as part of a pipeline curtailment plan, it expressly refrained from "intimat[ing any] view one way or the other as whether compensation should be included" in the particular plan before it (Pet. App., p. 12a).[2] As recently summarized by the Court of Appeals[3] its holding in the instant case.

[2] "Our review of the Commission's decision is guided by the principle that, while we may not order the Commission to exercise its discretion in a particular way, we may order the Commission to consider a matter that is within the jurisdiction if such be the case" (Pet. App., p. 8a).

In this regard it should be noted that there is a variety of situations in which compensation provisions are appropriate to mitigate the economic impact of curtailment. It is not limited to the situation set forth in the question as formulated by the Commission. See *infra*, pp. 8-12.

[3] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976).

> "rejected the Commission's jurisdictional argument and remanded for determination of whether compensation payments should be a condition for receipt of a higher priority in a gas curtailment plan."

The question presented, accordingly, is that of power alone, *i.e.*, whether the Commission's authority with regard to curtailment extends to the inclusion of compensation provisions in a pipeline curtailment plan in appropriate circumstances.

ARGUMENT

This case presents an unusual situation, in that it is the Commission which is urging that it lacks authority regardless of the pertinent facts and circumstances to include compensation provisions in natural gas curtailment plans subject to its jurisdiction and which is seeking review of the contrary holding of the Court of Appeals.[4] As noted by the Court of Appeals, the Commission's insistence that it lacks such authority reflects a rejection of the broad responsibilities with respect to natural gas curtailment, as outlined by this Court in *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and is based on strained and contrived reasoning

[4] The Commission's present position was first enunciated in its November 12, 1974 and January 10, 1975 orders in the Transco proceeding. See *supra*, p. 3. Prior to that time, the Commission had not only sanctioned such compensation provisions (see, *e.g.*, *Transcontinental Gas Pipe Line Corporation*, 46 FPC 1212 (1971); *Transcontinental Gas Pipe Line Corporation*, 48 FPC 1060 (1972); *Columbia Gas Transmission Company*, 48 FPC 647 (1972)), but has expressly recognized that such provisions are in the public interest to mitigate "the severe economic dislocation which curtailment can cause" (*Arkansas Louisiana Gas Company*, 49 FPC 53, 64 (1972)).

wholly at odds with the necessities for dealing with the great variety of problems resulting from pipeline curtailment.[5]

The Court of Appeals thus properly rejected the Commission's sweeping denial of authority, leaving for Commission determination whether the inclusion of compensation provisions was appropriate in the particular case. Moreover, while the Commission's assertion of general importance is predicated on the claim that the compensation issue is presented in a number of cases, the fact is that the instant case constitutes the only *court* decision on the matter and the additional cases referenced by the Commission (Pet., p. 10, fn. 4) reflect the several instances in which the Commission has insisted upon its erroneous view. Accordingly, leaving the decision below standing without further review should be sufficient as a practical matter to put the question to rest and there is no occasion for further review by this Court.

I. THE COMMISSION'S BROAD CURTAILMENT AUTHORITY EXTENDS TO THE INCLUSION OF COMPENSATION PROVISIONS

Although the Commission totally ignores the relevance of *Louisiana Power & Light* to the basic question here involved,[6]

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[5] Characterizing the Commission's present position as "approach[ing the problem] in reverse" (Pet. App., p. 9a), the court below noted (Pet. App., pp. 9a-10a):

> "* * * The asserted lack of jurisdiction is not because there is no statutory basis for compensation, but rather because there are effects of compensation as well as provisos within the Natural Gas Act that cumulatively preclude the implementation of compensation."

[6] The Commission's only reference to *Louisiana Power & Light* is in support of the thesis that the Commission may require curtailment plans to focus "on end-use rather than contractual entitlements" (Pet. pp. II, 16).

that case, as the Court of Appeals properly held, clearly is dispositive of the problem:

> "It seems plain * * * that the Commission is vested with both jurisdiction and broad power to solve the problems caused by curtailment." (Pet. App., p. 9a).

As the Court will recall, *Louisiana Power & Light* involved the Commission's curtailment authority with respect to direct sale of natural gas over which it had no rate jurisdiction. In there holding that the Commission's curtailment authority extends to such direct sales, the Court expressly noted that "[f]rom a practical point of view, [a contrary holding] may * * * produce a seriously inequitable system of gas distribution" (406 U.S. at 632) and that state authority could not "practicably regulate in this area to prevent this inequity and hardship" (*Id.* at 632-3).

Accordingly, as the court below observed (Pet. App., pp. 8a-9a), the Court there not only ruled that "the Commission must possess broad powers to devise effective means to meet these responsibilities" (*Id.* at 642), but it went on to hold – after pointing out that "[t]he substantive standard governing FPC evaluation of curtailment plans is found in Section 4(b) of the Act" (*Ibid.*) relating to discrimination – that (*Ibid.*):

> "* * * FPC and other agencies created to protect the public interest must be free, 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.' *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility * * *.
>
> "In applying this section, we have held that 'the width of administrative authority must be measured in part by the purposes for which it was

> conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); see *United Gas Pipe Line Co. v. F.P.C.*, 385 U.S. 83, 89-90 (1966).[7]

Application of the Commission's so-called end-use approach for allocating limited gas supplies plainly may result in situations in which compensation provisions are appropriate and, indeed, necessary, in order "to prevent * * * inequity and hardship;" accordingly, such provisions obviously fit within "a generous construction of the Commission's statutory authority." (406 U.S. at 632, 642)

By way of background, it should be noted that since natural gas has developed into one of the major sources of

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[7]In *Permian*, this Court observed (390 U.S. at 776):

"This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; see, *e.g.*, *Piedmont & Northern R. Co. v. Comm'n*, 286 U.S. 299; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193-194; *National Broadcasting Co. v. United States*, 319 U.S. 190; *American Trucking Assns. v. United States*, 344 U.S. 298, 311. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.[40]

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[40]We obtain additional assistance from §16; it provides that the Commission 'shall have power to perform any and all acts, and to prescribe . . . such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. 15 U.S.C. §717o.'"

fuel and raw material on the premise, *inter alia*, that it would remain in plentiful supply into the indefinite future,[8] distributing companies,[9] such as the North Carolina Distributors, have invested large sums of money in distribution and supplemental gas supply facilities. Since the natural gas business is heavily capital intensive, such investments are literally tremendous, aggregating several billions of dollars.

With, however, the onset of gas supply deficiencies and the concomitant reductions in the available gas supply, the distributors as well as the pipelines were confronted with a situation in which they could no longer make the sales to which they had become accustomed and for which they had become equipped. The reduction in sales thus made necessary had a cumulative effect, on the one hand, of creating excess capacity with concomitant heavily financial obligations, and, on the other hand, of reducing the level of sales with which to obtain the revenues needed to satisfy these obligations. Accordingly, in order to meet its financial obligations, a

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[8]For example, in *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208 (1964), affirmed, 359 F.2d 318 (5th Cir. 1966), *cert. denied*, 385 U.S. 847 (1966), the Commission pointedly observed (31 FPC at 218):

> "We do not dispute the contention that economically extractable gas reserves will suffer exhaustion at some indeterminate future date. However, we know of no reliable claim that such exhaustion of gas supplies is certain or even probable within this century. The fact that our gas reserves may be exhausted in the 21st century certainly does not establish that there is a present need for additional normalization."

[9]We have cast our discussion in terms of the problems confronting distributing companies as a result of curtailment, because that is the area of primary concern to the North Carolina Distributors and with which they are most familiar. It is not intended to reflect in any way upon the appropriateness *vel non* of compensation provisions in the direct sale situation presented in the instant case.

distributor has to increase its rates to its remaining customers in order to recover the fixed costs for investments formerly recouped through revenues from the sales discontinued because of curtailment.

If the gas available to a pipeline's distributor customers were allocated among them on a uniform basis, then all such distributor customers and the ultimate consumers to whom they resold their gas would bear the economic burdens resulting from the gas shortage proportionately. However, as illustrated by the situation on the Transco system to which the Commission makes repeated reference and with which the North Carolina Distributors are directly and immediately concerned, allocation of the available gas supply on a non-ratable basis, such as the Commission's so-called end-use approach, would result in substantially disparate economic impacts among the customer distributors and their ultimate consumers.

Since Transco extends from the South Gulf Coast area of Texas, through the Southern and Eastern Seaboard states up to the New Jersey and New York metropolitan areas, the areas through which it passes differ markedly in numerous respects, including but not limited to climate, density of population, nature and size of markets, industries and economic development. As a result, the marketing profile of each of Transco's distributor customers depends upon the mix of climate, population density and industrial development prevailing in its particular marketing area.

Accordingly, allocation of the gas among Transco's distributor customers on the basis of the use to which their ultimate consumers put the gas as contemplated by the Commission's so-called end-use approach results in widely disparate levels of curtailment among such distributor customers. For example, the evidence in the Transco proceeding (Exh. 116 in RP72-99) shows that allocation of Transco's gas supply (there assumed to be deficient by some 26%) among its distributor customers on the Commission's

end-use approach for the 1974-75 winter period results in curtailments ranging from a high of 73% to a low of 7%.

The same evidence indicates a curtailment of 43% for Piedmont, 34% for Public Service and 38% for North Carolina Natural for the 1974-75 winter period. This disparity in the impact upon the North Carolina Distributors is accentuated by the further facts that the curtailment on the Transco system is one of the deepest, if not the deepest, of all pipeline curtailments; that Transco is the North Carolina Distributors' sole source of gas for service in North Carolina; and that many of Transco's other customers, particularly those in the Northeast, have at least one additional supplier and some have two or more. Cf. *Consolidated Edison Co. v. F.P.C.*, 511 F.2d 372, 379-380 (D.C. Cir. 1974).

Compensation provisions, which would mitigate the disproportionate impact of such disparate curtailment upon distributor customers and their ultimate consumers clearly would further the purposes which this Court had in mind in construing the Act as vesting curtailment authority in the Commission, *i.e.*, to avoid a "seriously inequitable system of gas distribution" and to prevent "inequity and hardship" as a result of curtailment (406 U.S. at 632). In such circumstances, the inclusion of such compensation provisions clearly is appropriate and, indeed, may be necessary, to render the plan "just and reasonable," within the meaning of Section 4(a) of the Natural Gas Act and to avoid undue preference and discrimination within the meaning of Section 4(b).[10]

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[10] See in *Rhode Island Consumers' Council v. F.P.C.*, 504 F.2d 203, 208 (D.C. Cir. 1974):

> "We perceive some merit in the contention that an approach that is blind to the differing degrees of hardship disruption of service may impose on different customers may constitute an unreasonable abandonment of reasoned inquiry merely for the sake of a convenient 'rule of thumb.' "

Moreover, as an "appropriate pragmatic adjustment * * * called for by particular circumstances" (406 U.S. at 642), compensation provisions come within "a generous construction of [the Commission's] statutory authority" as indicated by "the Commission's broad responsibilities" with respect to curtailment (*Ibid.*). Compensation provisions thus further the objectives of the Act as construed in *Louisiana Power & Light*, and, accordingly clearly fit within the Commission's authority as determined in that case.

II. COMPENSATION PROVISIONS ARE NOT PROHIBITED BY THE RATE OR CERTIFICATE PROVISIONS OF THE ACT

The Court of Appeals properly held not only that the Commission's curtailment authority extends to the inclusion of compensation provisions as just demonstrated, but also that such authority is not negated by other provisions of the Natural Gas Act.[11]

A. Compensation Provisions Do Not Involve "Rates" Within Sections 4 and 5

Contrary to the Commission's assertions, compensation provisions neither involve the establishment of rates within Sections 4 and 5 (Pet., p. 11) nor require a restructuring of pipeline rates (Pet., pp. 10, 12). Rather, compensation provisions are just what the words indicate them to be and nothing more, *i.e.*, compensation provisions which are a part of a plan for allocating a pipeline's limited gas supply and designed to mitigate hardship and inequity.

[11] Even if the Commission's arguments in this regard were sound as a legal matter (which they are not, as shown in the text), it would mean at most that there would be additional requirements to satisfy. It would not *per se* preclude the existence of authority in the Commission to permit the inclusion of compensation provisions in curtailment plans.

Their only similarity to rates is that they both may involve a transfer of funds. Such limited similarity, however, does not justify, much less require, the conclusion urged by the Commission. As summarized by the Court of Appeals (Pet. App., pp. 10a-11a):

> "The essential problem is that the Commission defines 'rates' too broadly. * * * It seems to us * * * that compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission. * * *"

That "rates" as used in the Natural Gas Act does not extend to compensation provisions included in curtailment plans is reinforced by the principle that since the Natural Gas Act does not provide a definition of "rates," the word is to be construed in a manner best designed to effectuate the regulatory purposes and objectives of the Natural Gas Act. *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) and cases there cited; *Mobil Oil Corp. v. F.P.C.*, 463 F.2d 256, 259 (D.C. Cir. 1972), *cert. denied*, 406 U.S. 976 (1972).

So viewed, compensation payments clearly do not constitute "rates" since the contrary reading would frustrate the purposes of the Act by unduly restricting the flexibility needed to devise effective means to cope with the novel and complex problems resulting from the gas shortage.[12] As

[12] The propriety of such a result is further reinforced by the fact that in *Lousiana Power & Light*, this Court also agreed, *inter alia*, with the Commission's finding in *United Gas Pipe Line Company*, 46 FPC 786 (1971) that compliance with Section 7(b)'s abandonment provision generally is not required in connection with curtailment proceedings,

shown elsewhere herein, compensation provisions constitute a means of coping with some of the harshness and inequities caused by curtailment.

In this regard, as the Court of Appeals also noted (Pet. App., p. 11a), compensation payments are analogous to penalty payments, which the Commission has recognized as not constituting "rates" and in connection with which it has not undertaken to apply the "cost of service" standard, which it is here pressing as a barrier to the propriety of compensation provisions. See *e.g., Panhandle Eastern Pipeline Co.*, 46 FPC 1142, 1145 (1971); 47 FPC 1567, 1569 (1972); *United Gas Pipe Line Co.*, 50 FPC 1348, 1369 (1913); *El Paso Natural Gas Co.*, 51 FPC 2053, 2066 (1974).

Just as the Commission approved increases in the overrun penalties in these cases not on the basis of cost of service but as "appropriate in light of the supply situation and the prices of alternate fuels reflected therein" (see *El Paso Natural Gas Co., supra* at 2066), so also the gas supply shortage and the potential of the corollary curtailment plans for causing widely disparate adverse impact similarly require that the Commission's curtailment authority be held to include compensation provisions uncontrolled by the cost of service standard pressed by the Commission.[13]

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even though the result of the curtailment is a reduction in service (406 U.S. at 645-6).

[13]The cost of service standard invoked by the Commission (Pet., pp. 12-13) as a further obstacle to compensation provisions is irrelevant. That standard applies to the *total* revenues received by a pipeline company in connection with the *totality* of its jurisdictional sales. It is inapplicable to compensation provisions since they would be a "wash" as far as the pipeline company is concerned and hence would have no effect upon its total jurisdictional revenues. To the extent that the validity of compensation provisions may be read as involving any rate making principles, it would be those relating to the fixing of individual rates, *i.e.*, rate design, and in this respect it is established that fairness and equity in the circumstances are of greater importance. (See, *e.g.*, *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 589 (1945).

B. Compensation Provisions Do Not Constitute "Sales" Requiring Certificates Under Section 7 or Tariff Filings Under Section 4

There, likewise, is no merit to the Commission's claim (Pet., pp. 14-15) that compensation provisions would necessarily result in "sales for resale in interstate commerce" for which certificates under Section 7 and tariff filings under Section 4 would be required. As in the case of "rates" just discussed, the Act does not provide a definition of "sales" and adoption of the Commission's construction would frustrate the Act's purpose by making it all the more difficult for the Commission to deal with the problems caused by the gas shortage.

Moreover, it is clear, as a factual matter, that the curtailment plan in the *Transco* proceeding to which the Commission refers in this connection (Pet., p. 15), does not involve any "sales" or "brokering" of gas. Contrary to the Commission's implications (Pet., p. 15), that plan makes no provision for the shifting of gas by or among Transco's customers during the period that the plan was in operation. Rather, the curtailment plan provides for fixed entitlements of gas for each of Transco's customers for both the winter and summer seasons covered by the plan, with the only adjustments in such fixed entitlements contemplated being those required to reflect changes in Transco's gas supply. Such adjustments are shared among Transco's several customers in accordance with a formula for determining each customer's entitlement from Transco specifically prescribed by the plan.

Not only is there no foregoing of gas by some customers or acquiring of gas by other customers under the Transco plan, but the compensation provided is not paid by one customer to another. Rather, the matter is handled by debits and credits in Transco's bills to these customers, with no one customer's bill computed in relation to another customer's bill. The determination of credits and debits, made solely by Transco, is based upon systemwide considerations, not those

of individual customers and it would be an extreme coincidence if one customer's credits equalled another debits. Thus, nothing either in the way of gas or in money passes from one customer to another during the operation of the plan. Each customer receives the gas to which it is entitled under the plan without reference to the deliveries by Transco to any other customer. And, for the gas which it receives, each customer pays its bill to Transco in accordance with Transco's tariff, including the provisions as to debits and credits.

Plainly, therefore, for the period of the plan, there are no gas transactions which even remotely resemble "sales of gas for resale in interstate commerce," within the Act, necessitating compliance with the requirements of Section 4 and Section 7(c).

III. COMPENSATION PROVISIONS MITIGATE RATHER THAN FOSTER DISCRIMINATION

Finally, there is no substance to the Commission's additional contention (Pet., pp. 13-14) that "rates resulting from compensation schemes would necessarily be unduly discriminatory, contrary to Section 4(b) of the Act." Apart from the fact, as shown *supra*, pp. 12-14, that compensation provisions do not constitute rates, it is clear, as shown *supra*, pp. 8-12 that, far from fostering discrimination, compensation provisions, properly utilized, operate to mitigate the discrimination which would otherwise result, particularly to distributors, from the disparate impact of end-use curtailment. Accordingly, the anti-discrimination requirements of Section 4(b) (which provide the substantive standards for evaluating curtailment plans (see *supra*, p. 7)) support, rather than prohibit, compensation provisions.

The Commission's contrary arguments reflect a failure fully to analyze the operation of the Transco curtailment plan, on which these arguments are based. In the first place, the Transco plan does not result in "the pipeline '* * * charg[ing]

different rates to similarly situated customers * * *' " (Pet., p. 14). The fact of the matter is that distributor customers similarly situated as to both gas entitlements and curtailment levels are treated exactly alike and hence do not pay different "rates." As the Commission apparently recognizes (Pet., p. 14), the allegedly different "rates" occur only when there are differences in curtailment levels and hence different situations.

Secondly, under the Transco plan, all ultimate consumers to be served are for the most part *at or above comparable priorities*. Indeed, the basic thrust of the Commission's whole end-use approach is that the pipeline's available gas be allocated among its distributor customers so that only ultimate consumers at or above comparable priorities are served regardless of the particular marketing profile or ultimate consumer mix of the pipeline's various distributor customers.

Finally, and most important, at the same time that the Commission's end-use approach is designed to serve ultimate consumers at or above comparable priorities, regardless of the marketing profile of the distributor, such an approach operates to subject the distributors to varying levels of curtailment due to differences in marketing profile and ultimate consumer mix. See also, *supra*, pp. 10-11.

As a result, absent compensation provisions, a distributor with a below-average high priority load would be curtailed in excess of system average; hence in order to recoup costs formerly recovered through sales discontinued because of curtailed gas supply, it would have to increase its rates to its high priority customers (the only ones still being served) *more* than would be required under ratable curtailment. On the other hand, a distributor with above-average high priority loads would be curtailed below system average; as a result the rate increase to which it would have to subject its high priority customers (also the only ones still being served) in order to recoup costs formerly recovered through discontinued sales would be *less* than would be required under ratable curtailment.

Thus, although all ultimate consumers served by a pipeline's various distributor customers would be at or above comparable priorities of curtailment, those served by distributors subjected to above-average curtailment would, in the absence of compensation provisions, be subjected to greater rate increases and hence would be penalized in favor of those being served by distributors enjoying below average curtailment and subjected to far smaller, if any, rate increases. Consequently, far from operating to "penalize high priority users for the benefit of low priority users" as the Commission urges (Pet., p. 14), compensation provisions serve to mitigate the disparate impact upon distributors and their ultimate consumers at or above comparable priorities, thereby avoiding the unfairness and unreasonable discrimination which would otherwise result.

The foregoing also demonstrates the invalidity of the Commission's additional assertion that compensation provisions would "operate inconsistent [sic] with the approved objective of the Commission to base curtailment on end-use" (see Pet., pp. 15-17). Not only is the assumption (Pet., p. 16) underlying this argument unsound as just shown (*supra*, pp. 16-18), but the inclusion of compensation provisions in the Transco plan does not mean "incorporating a financial disincentive for high priority natural gas consumption" (see Pet., p. 17). Since the costs both of alternate fuels and of supplemental gas supplies are far greater than the compensation provided, the right to obtain additional pipeline gas is far more valuable to the distributors and their ultimate consumers than the compensation provided.

Any possible question in this regard is put to rest when it is remembered that the compensation provisions in the Transco curtailment plan referred to by the Commission (Pet., p. 16) were part of a settlement accepted by all but one of Transco's distributor customers and no distributor customer entitled to receive gas in excess of system average and without other pipeline gas manifested any interest or desire voluntarily to give up such additiona' gas in order to avoid the compensation provided. By the same token, each distributor

entitled to receive compensation would gladly give such compensation up if it meant obtaining additional gas. These considerations plainly highlight the invalidity, as a practical matter, of this Commission argument. Cf. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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